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In The Supreme Court
Of The United States

October Term, 1987

STATE OF WYOMING,
Plaintiff,
vs.
STATE OF OKLAHOMA,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT AND SUPPORTING BRIEF

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MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT AND SUPPORTING BRIEF

MOTION FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 9.3 of the Rules of the Supreme Court of the United States, plaintiff State of Wyoming respectfully asks leave of the Court to file the Complaint which is submitted herewith, for the reasons stated therein and in the attached supporting brief.

Joseph B. Meyer
Attorney General for Wyoming
Counsel for Plaintiff

April, 1988

STATEMENT IN SUPPORT OF MOTION

This is an action by the State of Wyoming against the State of Oklahoma under the authority of article III, §2. cl. 2, of the Constitution of the United States. The purpose

of the action is to invalidate an Oklahoma law requiring utilities operating coal-fired generating plants to burn a mixture containing a minimum of ten percent Oklahoma-mined coal, OKLA. STAT. tit. 45, §939 (Supp. 1986), which became effective January 1, 1987. (See Appendix A-1). The original jurisdiction of this Court is invoked because the parties are states and because full and complete relief is possible only in this Court.

Wyoming contends that the Oklahoma law is an unconstitutional restriction of access to Oklahoma markets by sellers of coal mined in Wyoming. Some of these sellers have been directly affected because they have exclusive coal requirement contracts with Oklahoma entities operating coal-fired generating plants. All the citizens of Wyoming are directly affected because Oklahoma purchasers pay severance taxes on the coal mined and produced in Wyoming. Citizens of Wyoming in certain localities are also affected because coal mining is one of Wyoming's principal industries, on which other economic activity is dependent.

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STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

COMPLAINT

The State of Wyoming, by its Attorney General, brings this suit in equity against defendant State of Oklahoma and for its cause of action states:

I.

Plaintiff is a sovereign state of the United States.

II.

Defendant is a sovereign state of the United States.

III.

The jurisdiction of this Court is invoked under article III, §2, cl. 2, of the Constitution of the United States.

IV.

Wyoming is a leading state in the production and sale of subbituminous coal. Producers of Wyoming coal ship it by rail to a number of other states, including Oklahoma. Oklahoma utilities purchased over ten million tons of Wyoming coal in 1986.

V.

As one of its essential sovereign functions, Wyoming imposes severance taxes on the production and sale of Wyoming coal. The taxes are calculated on a per ton basis of coal sold by Wyoming producers. Wyoming producers sell a large portion of Wyoming coal in interstate commerce. The severance tax receipts from these sales are a significant revenue source for plaintiff.

VI.

Plaintiff derives significant severance tax revenues from the sale of Wyoming coal to Oklahoma coal-fired plants. The severance tax payable by Oklahoma utilities to Wyoming exceeded $9,000,000 in 1982.

VII.

Defendant has enacted a law requiring Oklahoma utilities operating coal-fired generating plants to burn a mixture containing a minimum of ten percent Oklahoma coal. This law was codified under the Oklahoma statutes as Section 939 of Title 45 and became effective January 1, 1987 (the "Act").

VIII.

Before the Act was passed, over ninety-nine percent of the coal burned in Oklahoma coal plants was from Wyoming. The Act, therefore, requires Oklahoma utilities to reduce their use of Wyoming coal by nearly ten percent. It makes no distinction other than the source of coal in ordering this reduction. Since the effective date of the Act, Oklahoma coal-fired plants have increased their purchases of Oklahoma coal and decreased their purchases of Wyoming coal.

Defendant's admitted purpose in barring Wyoming coal was to promote economic development of Oklahoma coal and to reduce payment of Wyoming severance taxes by Oklahoma utilities.

IX.

Local governments within Wyoming are also directly affected by the Act because severance taxes ultimately fund a variety of local governmental projects. Reduction in severance taxes injures the local governments. Thus, Wyoming has standing as *parens patriae* to bring this action on behalf of its citizens.

X.

On its face, and regardless of application, the Act violates the Commerce Clause of the U.S. Constitution in that it creates a direct barrier to the interstate movement of coal from Wyoming. Because the Act has no effect other than to discriminate against interstate coal, there are no factual issues to be determined before resolution of the Commerce Clause issue.

XI.

Oklahoma's actions have caused and will continue to cause irreparable injury to the State of Wyoming, for which there is no adequate remedy at law.

WHEREFORE, plaintiff prays:

A. That the Court grant plaintiff's motion for leave to file its complaint and assume original jurisdiction of the this case;

B. That the Court enter a decree declaring OKLA. STAT. tit. 45, §939 (Supp. 1986) to be in violation of the Constitution of the United States;

C. That the Court enter a decree permanently enjoining and restraining defendant from enforcing or attempting to enforce OKLA. STAT. tit. 45, §939 (Supp. 1986).

D. That the court enjoin enforcement of OKLA. STAT. tit. 45, § 939 (Supp. 1986) during the pendency of the proceeding; and

E. That the Court grant such other relief it may deem proper.

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VERIFICATION

Personally appeared before me, Joseph B. Meyer, who, being duly sworn, deposes and says that he is the Attorney General of Wyoming; that he has read the foregoing Complaint and knows the contents thereof; that the same are true of his own knowledge, except as to these matters and things stated therein upon information and belief, and that as to these matters and things, he believes them to be true.

Arloa L. Larson
Notary Public

My commission expires:

April 8, 1988

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STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

QUESTIONS PRESENTED

I. Whether this Court should assume exclusive jurisdiction of this controversy between the sovereign states of Wyoming and Oklahoma.

II. Whether the Oklahoma statute which on its face restricts the movement of coal in interstate commerce is invalid under the Commerce Clause of the United States Constitution.

JURISDICTION

Plaintiff State of Wyoming seeks to invoke the original and exclusive jurisdiction of the Court pursuant to article III, §2, cl. 2 of the United States Constitution, which grants the Court original jurisdiction in an action between states. Both Wyoming and Oklahoma are sovereign states of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution,
article III, §2, cl. 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction.

United States Constitution
article I, §8, cl. 3:

> The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Judiciary Act,
28 U.S.C. § 1251(a) (1982):

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

STATEMENT OF THE CASE

Plaintiff has initiated this action to set aside, on constitutional grounds, an Oklahoma statute which interferes with the interstate sale of coal produced in Wyoming.

On March 26, 1986, the Oklahoma Legislature approved S.B. No. 458, which is codified as OKLA. STAT.

tit. 45, § 939 (Supp. 1986) (the "Act"). The Act mandates the use of Oklahoma coal:

> [a]ll entities providing electric power for sale to the consumer in Oklahoma and generating said power from coal-fired plants located in Oklahoma shall burn a mixture of coal that contains a minimum of ten percent (10%) Oklahoma mined coal, as calculated on a BTU ("British Thermal Unit") basis. OKLA. STAT. tit. 45, § 939 (Supp. 1986)

The Act attempts to assure that costs to consumers will be kept under check:

> The cost to the entity shall not increase the cost to the consumer or exceed the energy cost of existing long-term contracts for out-of-state coal preference including preference given Oklahoma vendors as provided in Section 85.32 of Title 74 of the Oklahoma Statutes. OKLA. STAT. tit. 45, § 939.1 (Supp. 1986)

The Act prevents Oklahoma utilities with coal-fired electrical generating plants from generating more than 90% of their energy production from out-of-state coal.[1] The Act's single test for determining the acceptability of coal to be burned by Oklahoma coal plants is whether it is mined within the borders of Oklahoma.

[1] The Oklahoma utilities with one or more coal-fired electrical generating plants are the Grand River Dam Authority with a coal plant in Pryor, Oklahoma; Oklahoma Gas & Electric Company with coal plants in Muskogee and Ponca City; Public Service Company of Oklahoma with a coal plant in Oologah; and Western Farmers Electric Cooperative with a coal plant in Hugo.

The Act creates a cost exception to its 90% rule by exempting the use of Oklahoma coal if its cost to consumers or its energy cost to Oklahoma coal plants exceeds the cost of "existing long-term contracts for out-of-state coal" by five percent.[2] Thus, out-of-state long term contracts are expressly impaired unless they result in costs lower than the cost of Oklahoma coal.

Wyoming contains nearly one-fourth of the nation's recoverable coal resources[3] and ranks second in coal production.[4] It has the country's largest in-place coal resources, nearly one trillion tons.[5] The state is the major producer of subbituminous coal, mainly from the Powder River Basin geological formation.[6] Powder River Basin coal has a relatively low sulfur content.[7] It is primarily sold to utility plants outside Wyoming.

Coal producers in Wyoming depend heavily on interstate commerce for distribution of their product. In 1983, about 83% of the coal mined in Wyoming went to power plants in at least 14 other states. Overall, 84% of the coal mined in Wyoming in 1983 was shipped out-of-state.[8]

[2] OKLA. STAT. tit. 74, § 85.32 (1980). See Appendix, A-1.

[3] 1985 *Keystone Coal Industry Manual* 610. This accounts for the nation's reserves that are under less than 6000 feet of overburden.

[4] Wyoming Department of Labor and Statistics, *Wyoming Coal Mining: A Wage and Employment Survey* 3 (1986).

[5] *Id.* at 635.

[6] *1985 Keystone Coal Industry Manual* 618 (1985). The Powder River Basin is a 12,000 square mile coal-bearing area which includes all of Campbell County and parts of a number of other counties in the state. The Powder River Basin is in the northeastern part of the state and is one of ten coal-bearing formations in the state.

[7] *Id.*, Table 1, at 613.

[8] *Id.* at 618.

As of 1983, Wyoming coal was used in twenty-three states. Oklahoma was the fourth largest consumer of Wyoming coal during 1983, using nearly 12% of the Wyoming coal sold in interstate commerce.[9] Figures from more recent years show the same pattern. Eighty-four percent of the state's coal production was shipped out of Wyoming in 1985.[10] During 1986, Wyoming producers shipped 11.8 million tons of Wyoming coal to Oklahoma, with 99% of that amount being used by Oklahoma coal-fired generating plants.[11]

Wyoming imposes severance taxes on the mining and production of its coal. WYO. STAT. §§ 39-6-301 to 39-6-307 (1977). (See Appendix A, 3-10.) These severance taxes are a major source of revenue to plaintiff and ameliorate the negative impacts of mining within the state.[12] Because the severance taxes are calculated as a percentage of the sales price[13], the amount of severance

[9] Institute for Policy Research, University of Wyoming, 3 *Wyoming Quarterly Update*, No. 4, at 7 (Summer, 1984).

[10] *Id.* at 4.

[11] Energy Information Administration, DOE/EIA-0125(86/4Q), *Coal Distribution, January-December, 1986* (1987).

[12] The Wyoming Mines Product Taxes (the "severance tax") is designed to allocate revenues to a variety of state needs, including assistance to political subdivisions which are "directly or indirectly impacted by the production of minerals." WYO. STAT. §39-6-305 (1977). There are a number of individual excise taxes on extraction of minerals, with the revenues from surface coal mining to be deposited (a) 2½% in Wyoming mineral trust fund, (b) 2% in general fund, (c) 1½% in Wyoming water development account or the general fund, (d) 1% to the highway fund, and (e) 1½% payable to the department of revenue and taxation to be deposited in the capital facilities revenue account. WYO. STAT. §39-6-302 (1977) See Appendix, A-3 through A-10 for the text of these statutes which govern the collection and distribution of Wyoming severance taxes.

[13] Valuation is based on the "fair cash market value of the product at the mine or mining claim where produced after the mining or production process is completed." WYO. STAT. § 39-2-202(a) (1977).
If the coal is sold at the mine, "the fair cash market value shall be deemed to be the price established by bona fide arms-length sale." WYO. STAT. § 39-2-202(c) (1977).

tax collected depends directly on successful sale of Wyoming coal by Wyoming producers.

Coal and Wyoming have grown together. The history of coal production in Wyoming reflects the state's social and economic history. The production and sale of coal has profoundly affected Wyoming's economic well-being, especially during the last decade. For example, from 1976 to 1986, the assessed valuation on coal multiplied tenfold from $125 million to $1.3 billion.[14] This dramatic leap concomitantly increased tax revenues used to fund governmental services.

Oklahoma also has coal. However, the total production in Oklahoma is 245 million short tons in 110 years, as compared to the production of 112 million tons of Wyoming coal in only one year.[15] The average daily production per miner (short tons) of Oklahoma coal was 16.08, compared to 93.86 for Wyoming coal.[16] A major reason for this difference is that Oklahoma coal seams are extremely thin compared to Wyoming coal seams.[17]

The disparity of coal production between Wyoming and Oklahoma disturbed Oklahoma lawmakers. In 1985,

[14] Mineral Division of Economic Development and Stabilization Board, State of Wyoming, *1986 Wyoming Mineral Yearbook* (1986).

[15] *1985 Keystone Coal Industry Manual* 545 (1985).

[16] Energy Information Administration, *Coal Production 1983*, DOE/EIA-0118(83) 48, and Table 33 (1984).

[17] *1985 Keystone Coal Industry Manual*, 1-7' thickness in Oklahoma, (at 548); up to 200' thick in Wyoming (at 620). Some of the Oklahoma seams are measured in inches rather than feet. Also, Oklahoma coal tends to be located in seams that dip sharply. See, *The Daily Oklahoman* (Oklahoma City, Oklahoma), August 23, 1985, at 29, which acknowledges that "the state's coal industry has languished as a result of the greater polluting properties of Oklahoma coal due to its sulfur content and because Oklahoma coal is generally found in relatively thin seams that are expensive to mine."

they approved a resolution entitled "Mines and Minerals-Coal-Domestically Produced Coal" (the "Resolution").[18] The Resolution requested Oklahoma utilities to buy Oklahoma coal for blending with Wyoming coal to (a) reduce payments to Wyoming producers, (b) lower Wyoming severance tax payments and (c) stimulate the local economy.

The Resolution requested cooperation from Oklahoma coal plants. Press reports indicate that Oklahoma coal plants tried to accede to the Legislature's request.[19] However, coal industry representatives in Oklahoma were still dissatisfied.[20] In March 1986, Oklahoma law-

[18] OKLA. S. Res. No. 21. Adopted by the Senate June 11, 1985. Adopted by the House of Representatives June 15, 1985. Filed with the Secretary of State June 13, 1985; see Appendix, A-11 to A-12.

[19] U.P.I. Release dated February 11, 1986 -- Oklahoma Gas & Electric Co. announced its order of 20,000 tons of Oklahoma coal and its plans to purchase an additional 50,000 tons in following month. *Electric Utility Week*, Aug. 5, 1985, at 16:

> "If the first round of experiments is successful, another 20,000 tons of Oklahoma coal with a higher sulfur content will be tried. The experiments are similar to those being conducted by Public Service Oklahoma at its Northeastern Station near Oologah. Both utilities are conducting the tests primarily to see if they can help the state's economy by purchasing fuel from Oklahoma's beleaguered coal industry.
>
> "We know it would help the economy of Oklahoma if we could use state-produced coal," said George Gibbons, OG&E vice president of production.

11 *Coal Week*, No. 33, at 3 "OK Utilities Looking in Back Yard to Supplement Western Coal Purchases," August 19, 1985. This article outlines the efforts of Oklahoma Gas & Electric Co., Public Service Company of Oklahoma, and Western Farmers Electric Cooperative to purchase Oklahoma coal in response to the Resolution. *See also, Electric Utility Week*, November 25, 1985, at 1o regarding efforts of these utilities.

[20] *News Capitol & Democrat*, (McAlester, Oklahoma), December 11, 1985. "Oklahoma coal mines disagree with State Sen. Gene Stipe's contention that legislation isn't necessary to force Oklahoma utilities to burn a 10% mix of state coal with Wyoming coal." A similar report appeared in the *Daily Oklahoman* on December 1, 1985 "Is Coal Boom Needed for County?" While the Oklahoma coal plants cooperated on purchasing Oklahoma coal, they expressed a general opposition to fixed percentages. "Debate Simmers on

makers promulgated the Act mandating the use of Oklahoma coal. As indicated by the earlier-enacted Resolution, the defendant engaged in its legislative efforts to "direct distribution," "promote economic development" and reduce payments of severance tax to plaintiff by reducing the import of Wyoming coal.

Oklahoma's utilities have announced their intention to reduce purchases of Wyoming coal due to the Act.[21] In fact, Oklahoma coal plants have increased their purchases of Oklahoma coal from 252,000 tons for all of 1986 to 337,000 tons for the first six months of 1987. Assuming that the rate continued for the rest of 1987, Oklahoma purchases would have increased at 267% because of the act.

For the same period, Wyoming coal sold to Oklahoma experienced its first decrease since 1982. In the first six months of 1987, Oklahoma coal plants purchased 5,345,000 tons of Wyoming coal. Assuming the same rate

Burning Oklahoma Coal, Bill Aims at 10% Minimum Supply," *Electric Utility Week*, January 27, 1986:

> Efforts by state lawmakers to force Oklahoma's four major generating utilities to use at least 10% Oklahoma coal at their 10 coal-fired plants in the state have created a sometimes bitter political conflict. Proponents of the requirement say it would mean more jobs and tax dollars in the economically depressed state, while opponents argue that it could raise power bills and actually stifle growth.

The article recites the united opposition of the Oklahoma utilities which referred to the proposed legislation as "ill-advised."

[21] *Daily Journal*, (Venita, Oklahoma), January 3, 1986; *Daily Oklahoman*, (Oklahoma City, Oklahoma), February 7, 1986. 13 *Coal Week*, No. 2, January 12, 1987, at 4. "Oklahoma utilities, complying with the 'Buy Oklahoma' law passed last year, ushered in 1987 with expanded shipments of Oklahoma coal." Article outlines the efforts of P.S.O. and G.R.D.A. but notes the environmental difficulties at G.R.D.A. due to malfunction of scrubber. 13 *Coal Week*, No. 8, February 23, 1987, at 4, notes that the scrubber was fixed and that G.R.D.A. is purchasing some Oklahoma coal from Amax, which also supplies Wyoming coal.

of purchases continued for the remainder of 1987, the total volume would be a 9% decrease for 1986. Wyoming has thus lost 9% of the severance taxes it would otherwise have collected from Oklahoma.

Other states may be following Oklahoma's lead. According to an industry source, a new Kansas coal commission may create a "buy Kansas" law. The Kansas coal would displace Wyoming coal.[22] Missouri may also be considering similar legislation. This trend among major purchasers of Wyoming coal could further damage Wyoming's revenues and industries.

SUMMARY OF ARGUMENT

This action puts in issue the constitutionality of an act of the State of Oklahoma which erects a barrier to Wyoming coal at the state line of Oklahoma, and is an exercise of economic protectionism which serves no legitimate local purpose. As such, the Act is a manifest violation of the Commerce Clause. This case is appropriate for original and exclusive jurisdiction because (a) plaintiff and defendant are sovereign states, (b) plaintiff is directly and substantially injured by the Act, (c) the case presents an important federal question, and (d) plaintiff has no alternative forum for resolution of the threat the Act presents to its sovereign interest. Plaintiff has standing to challenge the Act as *parens patriae* of its citizens.

[22] 13 *Coal Week*, No. 9, at 3, "Kansas Coal Study Funded: Buy Kansas' Law Forthcoming," (March 2, 1987).

ARGUMENT

I. A JUSTICIABLE CONTROVERSY EXISTS; THEREFORE, THE COURT SHOULD ASSUME ORIGINAL AND EXCLUSIVE JURISDICTION.

A. The State of Wyoming is the proper party to initiate this action, because it is directly injured by the Act due to reductions in severance tax collections.

In the Resolution, Oklahoma declared its intention to reduce severance taxes paid to plaintiff by Oklahoma utilities. Plaintiff is the intended victim of the Act[23] and will, by defendant's calculation, lose at least nine million dollars a year in severance tax revenues because of the Act.[24] As the party suffering the direct injury, plaintiff is the proper party to initiate this action.

The Constitution grants exclusive jurisdiction to the Supreme Court in disputes between two states. U.S. CONST., art. III, § 2, cl. 2. When such a case involves challenge to a statute, this Court insists that the plaintiff state sustain direct injury by the challenged action or statute. *Maryland v. Louisiana*, 451 U.S. 725, 735 (1981):

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[23] "Oklahoma's Gain, Wyoming's Loss," *Coal Age*, (June 1986) at 33.
"This means another 2,000 jobs in the state," said Bill Skeith, executive director of the Oklahoma Coal Producers Committee. He estimated the increased revenue to operators and to related industries would range from $35 million to $50 million annually.

* * *

"The gain for Oklahoma mining companies will be a loss for Wyoming producers that now supply the utilities. Oklahoma coal, mostly mined in eastern sections of the state, averages about 13,000 Btu, compared with Wyoming's average of 8,500 to 9,000 Btu," Skeith said.

[24] Appendix, A-11 to A-12.

> In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for redress. . ." Quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939).[25]

In *Maryland v. Louisiana*, the Court found that the plaintiff states were directly injured by a Louisiana statute which created a "first use" tax. The plaintiff states purchased some of the natural gas subjected to the tax. These states paid additional money for the gas required to run their governmental facilities and consequently sustained a direct injury.

Similar to the *Maryland* plaintiffs, plaintiff Wyoming will receive less tax money as a direct result of the Act, thereby sustaining a direct economic injury. Further, plaintiff Wyoming has in no way contributed to this economic injury. There is no action which Wyoming could now take to avoid injury, other than initiating this action. Defendant intended that plaintiff sustain the injury. Defendant promulgated the Act partly in reaction to plaintiff's severance tax[26], some of which had been in place for a number of years before the Act and which had been the subject of controversy in the Oklahoma legislature.

[25] See also, *New York v. Illinois*, 274 U.S. 488, 490 (1927); *Texas v. Florida*, 306 U.S. 398, 405 (1939).

[26] Note particularly the following language of the Resolution:

"Whereas, a 1982 Ozark Council Report states that $9 million of the ratepayers dollars was paid as severance tax to the State of Wyoming;

Okla. S. Res. No. 21, at Appendix, A-11 to A-12.

B. *This controversy is appropriate for determination by the Court because (1) it presents an important federal question, and (2) plaintiff lacks an alternative forum for resolution.*

Plaintiff meets the tests for demonstrating original jurisdiction as set forth in *Maryland v. Louisiana*, 451 U.S. 725 (1981):

> In *City of Milwaukee*, we noted what is "appropriate" involves not only "the seriousness and dignity of the claim", but also the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated and where appropriate relief may be had. 451 U.S. at 740.

The Court has consistently stated that it will exercise original jurisdiction in instances where an issue of appropriate "seriousness and dignity" is presented.[27] Indeed, the Court has recognized the seriousness and dignity of the Commerce Clause question in original jurisdiction cases. In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), the plaintiff state challenged a statute enacted by the defendant state which tried to keep natural gas within the defendant's borders. The defendant claimed that the issues did not meet the level of importance required in the original jurisdiction case. The Supreme Court disagreed:

> The question is an important one; for what one state may do others may, and there are ten states from which natural gas is exported for consumption in other states. Besides, what may be done with one natural product may be done

[27] *Maryland v. Louisiana*, 454 U.S. at 764; *see also, Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

> with others, and there are several states in which the earth yields products of great value which are carried into other states and there used. 262 U.S. at 596.

The controversy presented herein falls squarely within the "important" question test discussed by the Court in *Pennsylvania v. West Virginia*. Wyoming coal is a natural product of great value which is primarily carried into other states for use. Plaintiff receives significant revenues from this interstate movement. The Act directly blocks that movement in interstate commerce. If Oklahoma can block ten percent of Oklahoma-bound foreign coal from its borders today, it can exclude one hundred percent foreign coal at some future time. If Oklahoma can restrict Wyoming coal, so can other states whose producers have been unable to compete with Wyoming coal.

This controversy is also appropriate for consideration because the plaintiff has no alternative forum for resolution of this issue. Wyoming is the only party which can sue to prevent the loss of revenue to the state's coffers and the injury to its economy. For this reason alone, the state has no other forum in which to address its grievance.

Further, Wyoming has no identity of interest with any private party which could pursue a separate action relating to other effects of the Act. Although Wyoming's coal industry will be negatively affected by the Act, the interests of the state and the industry are not identical. Some of the coal companies which mine in Wyoming appear to have coal reserves in other states.[28] Even if these companies are able to offset some of the losses from

[28] See fn. 21

Wyoming operations with gains from operations in other states, the plaintiff cannot offset the loss to its treasury and to its economy in a similar fashion.

As of the date of the Complaint, plaintiff is unaware of any challenge to the Act by Wyoming coal producers. It is Wyoming and its citizens who suffer most directly from the Act; the state must act to protect these interests.

Plaintiff is suing to protect a vital sovereign interest. When Wyoming coal is blocked from movement in interstate commerce, Wyoming's injury is direct and substantial. If Wyoming is denied access to this Court and is required to place its sovereign interest at risk while hoping that a private party challenges the Act, it will continue to sustain a direct injury. Thus, plaintiff meets the test for demonstrating original jurisdiction.

C. *Plaintiff has standing to challenge the Act as parens patriae of its citizens who are injured by the Act.*

The coal industry is of paramount importance to Wyoming citizens and local governments. By law, severance taxes are deposited in a variety of accounts, including the water development fund and the highway fund. The taxes are also used for assistance to local governmental units for construction of public projects.[29] The doctrine of *parens patriae* is appropriate in this case. In bringing this action, the state is protecting the sovereign interest granted by the Constitution and is also protecting its citizens who cannot individually sue for the loss of tax revenues and the benefit of maintaining energy-related industries. If coal companies are injured by the Act, they can choose to relocate, or develop coal reserves in

[29] Appendix, A-7 to A-10.

Oklahoma. However, the citizens of Wyoming and the businesses which depend on the coal industry will be left with the economic burden of the loss of this industry. Wyoming schools will suffer; Wyoming people will suffer.

The Court has ruled that a state in plaintiff's circumstances is entitled to act on its citizens' behalf:

> Georgia as a representative of the public is complaining of a wrong, which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as parens patriae the right to invoke the original jurisdiction of the Court in a matter of this gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 451 (1945).

The numerous local governmental entities in Wyoming which benefit from Wyoming severance tax payments properly look to plaintiff as *parens patriae* to protect their interest. In *Maryland v. Louisiana*, the majority recognized the plaintiffs' " interest in protecting their citizens from substantial economic injury presented by imposition of the First-Use Tax." 451 U.S. at 739. In this case, plaintiff is protecting a vital sovereign interest with respect to its tax revenues and the development of its major resources,

as well as protecting local governmental interests within Wyoming. Thus, plaintiff has standing to challenge the Act as *parens patriae* to its citizens who are injured by the Act.

II. THE ACT VIOLATES THE "COMMERCE CLAUSE" OF THE UNITED STATES CONSTITUTION.

A. *On its face, the Act constitutes a direct and prohibited interference with interstate commerce.*

The Commerce Clause prohibits interference by the states in the movement of goods in interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322 (1979), *H.P. Hood and Sons v. DuMond*, 336 U.S. 525 (1949); *Edwards v. California*, 314 U.S. 160 (1941); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and *West v. Kansas Natural Gas Company*, 221 U.S. 229 (1910). These principles are fundamental to the integrity of this nation:

> By the Constitution, art. 1, §8, cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single Nation - one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it. Even their power to lay and collect taxes, comprehensive and

> necessary as that power is, cannot be exerted in a way which involves a discrimination against such commerce.
>
> ...
>
> Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission, is a regulation of interstate commerce — a prohibited interference. *Pennsylvania v. West Virginia*, 262 U.S. at 596.

The Act burdens and obstructs interstate commerce by impeding the flow of Wyoming coal at Oklahoma's borders. It is similar to the statute rejected by the Supreme Court in *Pennsylvania v. West Virginia*, in which West Virginia attempted to retain natural gas within its own borders. West Virginia insisted that the regulation was necessary to protect consumers within the state who might otherwise suffer shortages if the gas were allowed to move freely into interstate commerce. The Court rejected West Virginia's attempt to subordinate interstate commerce to local needs:

> In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do. A direction to one of her railroads, when short of facilities for moving coal, to haul intrastate coal to the exclusion of interstate coal,

> would not be different in kind or force. 262 U.S. at 597-98.

Oklahoma's Act is a mandate to its utilities to purchase "intrastate coal to the exclusion of interstate coal". As such, it is constitutionally invalid.

Oklahoma has been involved in similar efforts to isolate itself from interstate competition. In *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1910), the Court rejected Oklahoma's attempt to block the exit of natural gas from its borders and into interstate commerce:

> No state by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof. 221 U.S. at 261.

The sole purpose and effect of the Act is to displace foreign coal with Oklahoma coal. An Oklahoma utility looks only to the source of its coal to determine whether it complies with the Act. The Act is otherwise indifferent to characteristics such as sulfur and heat content or method of delivery. The Act has no effect other than discrimination against interstate coal.

In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Court invalidated a state statute which discriminated only as to source. In that case, New Jersey had enacted a statute prohibiting importation of waste from outside its borders. The statute was directed to privately-operated waste disposal sites in New Jersey. New Jersey was concerned that the continued importation of waste from other states would create insufficient space for waste originating in

New Jersey. The Court found the source-related discrimination to be constitutionally invalid:

> But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination. 437 U.S. at 626-27.

The Act provides no reason, other than origin, to distinguish coal purchased by Oklahoma utilities. Thus, it violates the constitutional principles set forth in *Philadelphia v. New Jersey*.

B. *The Act is a per se violation of the Commerce Clause because it constitutes economic protectionism.*

Wyoming coal has travelled freely in interstate commerce and into Oklahoma for many years. During this time very little Oklahoma coal was used within its own borders. As stated in the Resolution, Wyoming coal effectively competed with Oklahoma coal despite the time and expense required for Wyoming coal to reach Oklahoma coal plants. The Act is a response to the success of Wyoming coal and an attempt to protect the Oklahoma economy. In the Resolution, defendant stated that the purpose of blending ten percent Oklahoma coal would be to:

> assure at least a portion of the ratepayer dollars remaining in Oklahoma and enhancing the

economy of the State of Oklahoma.[30]

Thus, the Resolution expresses defendant's intent to protect its economic interests to the disadvantage of Wyoming coal. The Act which followed accomplished that purpose.

In a compelling decision which is precisely on point, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court condemned New York's attempt to prevent economic competition from out-of-state milk as a contravention of the Commerce Clause:

> New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesale quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. 294 U.S. at 521.

The Court expanded on the danger that economic protectionism presents to the viability of the Nation:

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

[30] Appendix, A-11 to A-12.

. . .

> Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division. 294 U.S. at 522-523.

If New York cannot protect its farmers by guarding them against competition from Vermont's farmers, then Oklahoma cannot protect its coal producers against competition from Wyoming coal producers. In *Philadelphia v. New Jersey*, the Court again rejected economic protectionism:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has

> been erected. (Citations omitted.) The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. 437 U.S. at 623-624.

On its face, the Act establishes economic protectionism of the Oklahoma coal industry. Further, the law overtly blocks a significant amount of Wyoming coal, and is thus invalid per se under the Commerce Clause.

The Court best summarized the situation presented by this dispute in *Maine v. Taylor*, 477 U.S. 131 (1986):

> Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to "simple economic protectionism" consequently have been subject to a "virtually per se rule of invalidity." 477 U.S. at _____, 91 LEd 2d 127.

Plaintiff understands that defendant faces difficult economic choices as a result of the severe drop in the price of oil and gas in recent years. Plaintiff recognizes that defendant and its citizens are anxious to develop a local coal industry to generate tax revenues and provide jobs for its inhabitants. Surely these are appropriate goals for the defendant to pursue. However, the method chosen by defendant is subject to the "per se rule of invalidity" recognized in the *Maine* decision.

Oklahoma is attempting to "even" its coal disadvantage by resorting to discrimination against Wyoming.[31] Plaintiff respectfully urges that the long-

[31] The defendant's disadvantage with respect to coal was alluded to by the Oklahoma Attorney General in *West v. Kansas Natural Gas Company*, 221 U.S. at 246

established precendents supporting a vital Commerce Clause be applied in this case.

C. *Defendant has the burden of proof to demonstrate that the Act serves a legitimate local purpose.*

When a statute erects a direct barrier to interstate commerce, the burden of proof in a dispute shifts to the state which enacted the legislation:

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. at ____, 91 LEd 2d 121.

The Act erects a barrier to at least one million tons of Wyoming coal per year. That barrier is a direct constraint on coal moving in interstate commerce. Thus, the burden shifts to defendant to establish a legitimate local purpose for this constraint.

D. *The Act does not protect a legitimate local purpose.*

Plaintiff has demonstrated that the Act, on its face, creates a direct burden on interstate commerce. It falls on defendant to prove two important facts: (1) that the Act serves a legitimate local purpose, and (2) that there is no other way of achieving this purpose.

In *Philadelphia v. New Jersey*, the Court acknowledged that some health protective measures may justify state

regulation of interstate commerce. 437 U.S. at 628-29. Although the Court did not accept New Jersey's argument concerning its restriction on the importation of waste, it did reference quarantine laws banning the importation of diseased livestock as an example of a health protective measure which would justify state regulation of interstate commerce.

In this instance, however, there is no dispute that the Act necessarily increases sulfur emissions in Oklahoma. Oklahoma coal has a higher sulfur content than Wyoming coal being burned by Oklahoma utilities and cannot be burned alone without exceeding applicable environmental standards.[32] Thus, there is no health or safety reason to use Oklahoma coal.

Further, even if a health or safety reason for the Act could be demonstrated, defendant would still have to demonstrate a basis for erecting a barrier to Wyoming coal. The recent case of *Maine v. Taylor* outlines the Constitutional requirements for review of legitimate local purpose in a "direct barrier" case. The law in question prohibited importation of bait fish into Maine. The constitutional challenge was made by an individual defendant charged with a violation of the Lacey Act for importing bait fish into Maine. The Court held that Maine had the burden of proof, since the Act created a direct

[32] Most Oklahoma coal-fired plants were constructed during the 1970's without scrubbers and thus relied on the low sulfur content of Powder River Basin coal to achieve the emissions standard of 1.2 pounds sulfur dioxide per million Btu. Oklahoma Regulation 3.4(c)(1)(B)(i)(c) (Control of Emission of Sulfur Compounds); 40 C.F.R. sec. 60.43. (Standards of Performance for Fossil-Fuel-Fired Steam Generators for Which Construction is Commenced after August 17, 1971). In 1977, the Clean Air Act was amended to clarify that the "standard of performance" for a new fossil-fuel-fired stationary source would include a requirement to utilize the "best available technology" to reduce pollutant emissions relating to a fuel source whether or not the

barrier to interstate commerce. Maine successfully proved that its sports fish population might be harmed by the introduction of the bait fish. Maine's experts expressed concern about the introduction of parasites into native species and indicated that the state had no available means to check for such parasites at its borders. Since the fact-finding court had accepted the possibility of injury, the Court upheld the statute and indicated that Maine would not be required to withstand substantial injury before it could condemn the importation. Maine succeeded because it demonstrated that it had no choice but to erect a barrier at its borders.

This Court has consistently required a stringent demonstration of a legitimate local purpose before validating a state enactment which discriminates against interstate commerce. For instance, in *Edwards v. California*, 314 U.S. 160 (1941), California had a clear local purpose when it enacted a statute which prevented the transportation of indigents across its borders from other states. California was extremely concerned about the economic and social disruption being created by a large influx of job and benefit seekers. This Court noted the concern, but rejected California's reasons.

From a Commerce Clause perspective, the Oklahoma Act is similar to the legislation in *Edwards*. There,

applicable emission standard could be achieved by relying of fuel content alone. 42 U.S.C.A. 7411, Public Law 95-95, sec. 109(c)(1)(a). Due to the dates of commencement of construction under this statute, most Oklahoma plants escaped this requirement. Thus, they continue to rely on fuel content to comply with the applicable emissions standards.

According to the 1985 *Keystone Coal Industry Manual*, Oklahoma utility and industrial coal has a weighted average sulfur content of 3.2%, at 548. On the other hand, the *Manual* notes that due to "contract demands, sulfur contents of mined Wyoming coals seldom exceed 1% and average only 0.5%" at 614. Based on chemical content, Oklahoma coals are in non-compliance; that is, they will produce emissions with a sulfur dioxide content in excess of 1.2 pounds per million Btu in a plant without a scrubber.

California's statute was an effort to protect the state's economy and to prevent potential health and morals problems. Here, the Act is designed to protect the state's economy and to protect and stimulate its coal industry.

Analyzing the California statute to determine whether it violated the Commerce Clause, this Court stated in *Edwards*:

> We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon "the wisdom, need, or appropriateness" of the legislative efforts of the States to solve such difficulties. (Citation omitted).
>
> But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.
>
> * * *
>
> It is difficult to conceive of a statute more squarely in conflict with this theory than the section challenged here. Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden on interstate commerce is intended and immediate; it is the plain and sole function of the statute. 314 U.S. at 173-174.

The economic slowdown currently facing Oklahoma and its coal industry is common to many states, most especially those states which rely upon the energy-producing industries for a large percentage of their revenues. And, as further stated by this Court in *Edwards*,

> [I]t is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. 341 U.S. at 173-174.

Defendant has no legitimate local purpose to justify the Act. It has needlessly obstructed commerce with the sole objective of eliminating competition from Wyoming coal. Nor has the defendant pursued less discriminatory alternatives available to achieve its desired purposes. Thus, the Act cannot stand.

CONCLUSION

Plaintiff has raised a serious question whether the Act is an unconstitutional discrimination against and burden upon interstate commerce. Plaintiff is the direct and intended victim of the Act and has raised the question to protect its sovereign interests. Because this case presents an important federal question for which plaintiff has no alternative forum, and because other states have threatened to enact similar legislation, plaintiff respectfully submits that leave be granted to file the proposed Complaint.

Respectfully submitted,

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APPENDIX

OKLA STAT. tit. 45, §939 (Supp. 1986)

Coal-fired electric generating plants - Burning Oklahoma Coal.

All entities providing electric power for sale to the consumer in Oklahoma and generating power from coal-fired plants located in Oklahoma shall burn a mixture of coal that contains a minimum of ten percent (10%) Oklahoma mined coal, as calculated on a BTU (British Thermal Unit) basis.

OKLA. STAT. tit. 45, §939.1 (Supp. 1986)

Cost increases to consumers and impairment of certain contracts prohibited.

The cost to the entity shall not increase the cost to the consumer or exceed the energy cost of existing longterm contracts for out-of-state coal preference including preference given Oklahoma vendors as provided in Section 85.32 of Title 74 of the Oklahoma Statutes.

OKLA. STAT. tit. 74, §85.32 (1980).

State school districts, counties and municipalities—Purchases—Preference to state-produced goods

A. The state and any school district, county or municipality and every person acting as purchasing agent for the state or any school district, county, municipality or tax exempt industrial trust

shall prefer, in all purchases, supplies, materials and provisions produced, manufactured or grown in this state; provided, that such preference shall not be for articles of inferior quality to those offered from outside the state, but a differential of not to exceed five percent (5%) may be allowed in the cost of Oklahoma materials, supplies and provisions of equal quality.

ARTICLE 3. MINE PRODUCTS TAXES

WYO. STAT. §39-6-302 (Supp. 1985)

Excise taxes on extraction of minerals.

(a) Except as otherwise provided in subsection (h) of this section, there is levied an excise tax of two percent (2%) of the value of the gross product extracted upon the privilege of severing or extracting uranium, trona, coal, except underground coal, petroleum, natural gas, oil shale or any other fossil fuel in the state. An excise tax of one and one-half percent (1½%) shall be levied on underground coal. The proceeds from this tax shall be deposited into the permanent Wyoming mineral trust fund.

(b) Except as otherwise provided in subsection (h) of this section, in addition to the excise tax imposed by subsection (a) of this section there is levied an excise tax of two percent (2%) of the value of the gross product extracted upon the privilege of severing or extracting any valuable deposit in the state except stripper production and underground coal. An excise tax of one and one-fourth percent (1¼%) shall be levied on underground coal. The proceeds from this tax shall be deposited into the general fund.

(c) In addition to the other excise taxes provided by this section there is levied upon the privilege of extracting coal except underground coal an excise tax of one and one-half percent (1½%) of the value of the gross product extracted. The proceeds from this tax shall be deposited in the Wyoming water development account or the general fund pursuant to W.S. 39-6-305.

(d) In addition to the other excise taxes provided by this section there is levied an excise tax on the privilege of extracting coal of one percent (1%) of the value of the

gross product extracted. The proceeds from this tax shall be transferred to the highway fund.

(e) In addition to the other excise taxes provided by this section, there is levied an excise tax on the privilege of extracting coal except underground coal of one-half of one percent (½%) of the value of the gross product extracted. The proceeds from the tax shall be deposited into the permanent Wyoming mineral trust fund.

(f) In addition to the other excise taxes provided for in this section, there is hereby levied upon the privilege of extracting trona, coal and uranium an excise tax of one and one-half percent (1½%) of the value of the gross product extracted. The proceeds from the tax are payable to the department of revenue and taxation and shall be deposited in the capital facilities revenue account within the earmarked revenue fund. The tax levied in this subsection shall expire on January 1 next following the year in which the taxes collected pursuant to this subsection total two hundred fifty million dollars ($250,000,000.00).

* * * *

(m) Notwithstanding subsections (a) through (j) of this section, when the application of taxes under this section results in a tax on a ton of coal in excess of eighty cents ($.80), the coal is exempt from the tax which exceeds eighty cents ($.80) per ton. This exemption shall be applicable to:

(i) New agreements entered into between March 31, 1987 and March 31, 1989 if:

(A) The application of the taxes in this section results in a tax on a ton of coal in excess of eighty cents ($.80) at the time the agreement is entered and the coal is first produced under the agreement.

(B) Production and delivery of coal actually commences pursuant to the agreement between March 31, 1987 and March 31, 1989;

(C) The coal is transported and consumed outside the borders of the state of Wyoming; and

(D) The new contract or agreement is not the result of the purchaser breaching a contract with another Wyoming producer; or

(ii) A contract or agreement which existed on January 1, 1987, or a modification to that contract or agreement occurring between March 31, 1987, and March 31, 1989, between a Wyoming coal producer and a purchaser for consumption in an electrical generating facility located in Wyoming to the extent that the producer's annual production and deliveries under the contract exceeds the average annual tonnage of coal delivered during calendar years 1985 and 1986. The exemption applies to the amount of additional coal produced in calendar year 1987 or 1988 and thereafter, so long as the additional coal is produced and delivered annually. If the annual deliveries after calendar year 1988 fall below the average of the 1985 and 1986 production, the exemption will no longer apply even if subsequent production exceeds the average of the 1985 and 1986 production.

(n) If the cumulative taxes levied against coal in this section do not exceed eighty cents ($.80) per ton, the tax proceeds shall be distributed in the manner provided in this section. If the cumulative taxes in this section exceed eighty cents ($.80) per ton, so that the eighty cent ($.80) per ton limit imposed by subsection (m) of this section becomes operative, an amount equal to one and one-half percent (1.5%) of the value of the gross product of coal extracted shall be deducted from the total tax proceeds for deposit in the permanent mineral trust fund and the

remaining proceeds shall be distributed on a pro rata basis for the purposes specified in this section and any other applicable law.

(o) The limitation on excise taxation provided for in subsection (m) of this section shall be applicable to a contract or agreement for the duration of its term or any extension thereof executed prior to March 31, 1989. If a producer and purchaser of coal under a contract or agreement existing on March 1, 1987, mutually rescind that contract or agreement and execute a new contract or agreement under substantially similar terms or amend an existing contract to diminish the total revenue which would have accrued under that contract, the coal sold under the new or amended contract shall be taxed under the provisions of this section without regard to the eighty cent ($.80) per ton limitation imposed by subsection (m) of this section.

* * * *

WYO. STAT. §39-6-305 (Supp. 1985)

General disposition of revenue collected.

(a) All quarterly payments received pursuant to W.S. 39-6-304(a)(i) and (ii) shall be transferred to an account of the trust and agency fund. The monies in this account shall be invested or deposited in accordance with W.S. 9-4-701 through 9-4-831, and any interest earned shall be credited to the general fund. On or before September 15 of each year, the revenue received under W.S. 39-6-304(a)(i) and (ii) shall be distributed in accordance with subsections (b), (c), (d), (g), (h), (j) and (k) of this section and W.S. 39-6-306(a). All other revenue received under this article shall be transferred to the state treasurer.

(b) The state treasurer shall transfer revenue collected under W.S. 39-6-302(a) to the permanent mineral trust fund except for the years beginning July 1, 1986 and July 1, 1987:

(i) One-fourth (¼) of the proceeds from all minerals except underground coal shall be deposited in an account within the trust and agency fund to be administered by the worker's compensation division as hereafter provided:

(A) Pooled interest earned on revenue within the account shall be credited to the state general fund as determined;

(B) For the fiscal year commencing July 1, 1986, whenever the total unencumbered revenues within the general fund, reserve fund and reinsurance accounts provided by W.S. 27-12-701 and 27-12-805 are less than six million five hundred thousand dollars ($6,500,000.00) the state treasurer may expend sufficient revenues from the account to pay employee claims under the Wyoming Worker's

Compensation Act;

(C) For the fiscal years commencing July 1, 1987 through June 30, 1991, whenever the unencumbered revenues within the worker's compensation account are less than six million five hundred thousand dollars ($6,500,000.00) the state treasurer may expend sufficient revenues from the account to pay employee claims under the Wyoming Worker's Compensation Act;

(D) Effective July 1, 1991, any revenues remaining in the account shall be credited to the Wyoming permanent mineral trust fund.

(ii) The balance shall be deposited in the permanent mineral trust fund.

(c) The state treasurer shall transfer revenue collected under W.S. 39-6-302(b) to the general fund.

(d) The state treasurer shall transfer revenue collected under W.S. 39-6-303 to an account within the earmarked revenue fund which may be cited as the political subdivision capital assistance account. Any unexpended balance in the account may be invested by the state treasurer and interest earned shall be credited to the account.

(e) The monies in the account under subsection (d) of this section shall be administered by the Wyoming farm loan board and disbursed by the board for use in areas which are directly or indirectly impacted by the production of minerals, to assist in financing public water, sewer, jail, highway, road or street projects. Not less than fifty percent (50%) of the revenue to the account shall be used to finance state highway, county road or city street projects. The Wyoming farm loan board may make grants from current revenues to any county, city, town, sewer district, water district or other political subdivision of the state, or the state highway department, with respect to

the use of the revenues under W.S. 39-6-303 subject to the following conditions. Any recipient of revenues under this subsection, may, with the approval of the Wyoming farm loan board annually reapply for and receive an additional grant under this subsection for the payment of any obligation to the state or other obligee. For new projects to be commenced after March 1, 1980, grants shall only be used to finance not more than fifty percent (50%) of the cost of any portion of a project and projects for street, curb, gutter or storm drainage improvements provided the farm loan board may make grants in excess of fifty percent (50%) of the cost of a project if the board finds that the applicant either levied at least seven (7) mills in the case of a city or town for operating expenses including special district levies chargeable against the general city or town levy during the current fiscal year or levied at least eleven (11) mills in the case of a county for operating expenses during the current fiscal year or the city, town or county is imposing the optional tax permitted by W.S. 39-6-412 at the time of the application and is utilizing all other local revenue sources reasonably and legally available to finance the project, and:

* * * *

(g) The state treasurer shall transfer revenue collected under W.S. 39-6-302(c) to the Wyoming water development account within the earmarked revenue fund. Any expenditures for any water development project shall be authorized by the legislature in a separate bill.

(h) The state treasurer shall transfer revenue collected under W.S. 39-6-302(d) to the highway fund.

(j) The state treasurer shall transfer revenue collected under W.S. 39-6-302(e) to the permanent Wyoming

mineral trust fund.

(k) The state treasurer shall transfer revenue collected under W.S. 39-6-302(g) to the trust and agency fund to be distributed as follows:

(i) Three-eighths (3/8) to incorporated cities and towns, each city or town to receive an amount in the proportion which the population of the city or town bears to the population of all cities and towns in Wyoming, population to be determined by resort to the latest federal census as periodically updated by the bureau of census;

(ii) One-eighth (1/8) to counties, each county to receive an amount in the proportion which the population bears to total state population, population to be determined by resort to the latest federal census as periodically updated by the bureau of census;

(iii) One-third (1/3) to the state highway fund;

(iv) One-twelfth (1/12) to the permanent mineral trust fund; and

(v) One-twelfth (1/12) to the Wyoming water development account to be distributed pursuant to W.S. 39-6-305(g) for the improvement of water projects completed and in use prior to 1970 and for other water projects if specifically appropriated for that purpose by the legislature.

OKLA. S. RES. NO. 21, 40th leg.

A concurrent resolution requesting Oklahoma Utility Companies using coal-fired generating plants to consider plans to blend ten percent Oklahoma coal with their present use of Wyoming coal; effecting a result of keeping a portion of ratepayer dollars in Oklahoma and promoting economic development; and directing distribution.

WHEREAS, Oklahoma has 380 million tons of surface minable coal of which 120 million tons are of low-sulfur containing less than one percent sulfur according to an estimate by the U.S. Bureau of Mines; and

* * *

WHEREAS, the use of Oklahoma coal would save significant freight charges on out-of-state coal from the State of Wyoming; and

WHEREAS, the savings on such freight charges could offset any possible costs associated with plant adjustments; and

WHEREAS, the coal-fired electric plants being used by Oklahoma utilities are exclusively using Wyoming coal; and

WHEREAS, the Oklahoma ratepayers are paying $300 million annually for Wyoming coal; and

WHEREAS, a 1982 Ozark Council Report states that $9 million of the ratepayers dollars was paid as

severance tax to the State of Wyoming; and

WHEREAS, the Oklahoma Legislature realizes that Oklahoma coal production does not meet the gross needs of the Oklahoma utility companies at this time.

NOW, THEREFORE, be it resolved by the Senate of the 1st Session of the 40th Oklahoma Legislature, the House of Representatives concurring therein:

THAT Oklahoma utilities using coal-fired generating plants seriously consider using a blend of at least ten percent Oklahoma coal with Wyoming coal and continue to meet quality standards.

THAT the result of such a blend would assure at least a portion of the ratepayer dollars remaining in Oklahoma and enhancing the economy of the State of Oklahoma.

* * *

No. 112, Original

Supreme Court, U.S.
FILED
JUN 10 1988

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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June, 1988

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QUESTIONS PRESENTED

I.

Does the interest of Wyoming, as the complaining state, establish the "strictest necessity" required for invoking this Court's original jurisdiction.

II.

Whether the challenged Oklahoma statutes are invalid because they violate the Commerce Clause of the United States Constitution.

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No. 112, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF THE CASE

The State of Wyoming has petitioned this Court asking it to set aside its primary appellate functions, and assume original jurisdiction in this cause against the State of Oklahoma.

It is the position of the State of Oklahoma that the interests advanced by the State of Wyoming in support of its

application are simply insufficient to establish the "strictest necessity" required for the invoking of this Court's original jurisdiction.

The complaint tendered by Wyoming asks this Court to adjudge an Oklahoma law invalid as violative of the Commerce Clause of the United States Constitution.

The challenged statutes require that utilities, providing electrical power generated from coal-fired plants located in Oklahoma and sold to consumers in Oklahoma, burn a mixture of coal that contains a minimum of 10% Oklahoma mined coal, as calculated on a British Thermal Unit basis. Okla. Stat. tit. 45, § 939. Under the statutory scheme, this requirement would not attach if the cost to the

utility for Oklahoma mined coal exceeded energy costs of existing long-term contracts for out-of-state coal or resulted in higher rates to Oklahoma consumers. Okla. Stat. tit. 45, § 939.1.[1]

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[1] Wyoming also attempts to attack Oklahoma Senate Resolution No. 21, passed by the Fortieth Legislature, 1985 Okla. Sess. Laws, 1694, and attempts to use the Resolution to interpret an act passed in the next legislative session. Plaintiff's reliance on this resolution for such purpose is misplaced. In Oklahoma concurrent resolutions, not being law, are not binding. Being nonbinding, such resolutions are often passed in short order, without the careful consideration afforded statutory law. In point of fact, the Resolutions relied upon by Plaintiff was adopted by the respective chambers of the Legislature within a day of each other (1985 Okla. Sess. Laws, 1694).

During the same session, the Fortieth Legislature used like concurrent resolutions to consider such weighty topics as: designation of square dance day (H.C. Res. No. 1010, 1985 Okla. Sess. Laws, 1717); adoption

(continued...)

The challenged statutes apply to four Oklahoma utilities with one or more coal-fired plants. One of these utilities is the Grand River Dam Authority which is owned and operated by the State of Oklahoma.

The Oklahoma statutes do not, as argued, create a barrier to the exportation of Wyoming coal at Oklahoma's state lines. Rather, under the statutory scheme, Wyoming may export as much coal as it desires to Oklahoma.

Nor do the Oklahoma statutes, as argued by Wyoming, directly interfere with Wyoming's imposition of coal

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[1](...continued)
of milk as the official beverage (S.C. Res. No. 2, 1985 Okla. Sess. Laws, 1691); and designation of Langley, Oklahoma as the fiddle capitol of the world (S.C. Res. No. 29, 1985 Okla. Sess. Laws, 1702).

severance taxes. To the contrary, Wyoming is free to impose a tax on all coal Wyoming produces severed from the earth in Wyoming. It is clear that Wyoming's tax is imposed on severance from the earth, not on the sale of coal. In point of fact, the statute relied upon by Wyoming specifically contains a section on the valuation of coal severed and used without sale. Wyo. Stat. 39-2-202(d) (1977). As such there is no direct, necessary relationship between Oklahoma's law and Wyoming's power to tax coal as it is severed from the ground in Wyoming.

SUMMARY OF ARGUMENT

Oklahoma's statute requiring electric utilities to burn a small amount of Oklahoma coal does not directly harm the State of Wyoming as a

sovereign state. Wyoming has only advanced a hypothetical loss of coal severance tax caused by a hypothetical drop in Wyoming coal sales and any harm does not affect its citizens generally. Wyoming's "interest" in the case is indirect, at best, and falls far short of establishing the "strictest necessity" for the invocation of this Court's original jurisdiction. Wyoming coal producers that might establish such a sales drop could easily litigate the issue in another forum.

Oklahoma's statute is immune from Commerce Clause attack since it is part of its regulation of domestic retail utility rates expressly authorized by Congress. It serves the legitimate local purposes of avoiding dependence

on a single energy source, increasing competition and lowering utility rates.

ARGUMENT

PROPOSITION I.

BECAUSE OF THE UNCOMPELLING NATURE OF THE INTEREST WYOMING SEEKS TO VINDICATE AND BECAUSE OF THE AVAILABILITY OF ALTERNATIVE FORUMS IN WHICH THE ISSUES PRESENTED CAN BE LITIGATED, WYOMING HAS FAILED TO ESTABLISH THE "STRICTEST NECESSITY" REQUIRED INVOKE ORIGINAL JURISDICTION.

INTRODUCTION

As noted in Illinois v. Milwaukee, 406 U.S. 91, 93 (1972), "[i]t has long been this Court's philosophy that its 'original jurisdiction should be invoked sparingly.'" (quoting from Utah v. United States, 394 U.S. 89, 95 [1969]).

In conformity with this philosophy, this Court has held that its original jurisdiction should not be exercised

unless it is "absolutely necessary." Commenting on the character of its original jurisdiction, this Court in Louisiana v. Texas, 176 U.S. 1, 15 (1900), stated:

> [I]t is apparent that the [original] jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute. . . .

Similarly, in Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 505 (1971), this Court required the establishment of the "strictest necessity" to justify the invoking of original jurisdiction.

This Court has also required that a state seeking to invoke original jurisdiction to control the conduct of another state must establish that the threatened invasion of its rights is of "serious magnitude." State of

Connecticut v. Commonwealth of Massachusetts, 282 U.S. 660, 669 (1931); New York v. New Jersey, 256 U.S. 296, 309 (1921); and Missouri v. Illinois, 200 U.S. 496, 521 (1906). Additionally, a state seeking such relief has a greater burden than that generally required of private parties seeking injunctive relief. State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. at 669; and North Dakota v. Minnesota, 263 U.S. 365, 374 (1923).

As noted in Justice Rehnquist's dissent in Maryland v. Louisiana, 451 U.S. 725, 762 (1981), this Court has recognized that expending its time and resources on original jurisdiction cases detracts from the Court's primary appellate duties.

> "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." . . . Original-jurisdiction cases represent an "intrusion on society's interest in our most deliberate and considerate performance of our paramount role as a supreme federal appellate court . . ."

In employing the "absolute necessity" standard to determine whether original jurisdiction should be assumed, this Court not only looks to the nature of the interest of the complaining state (the essential quality of the right asserted), but also inquires whether recourse to original jurisdiction is necessary to protect the state. Washington v. General Motors Corp., 406 U.S. 109, 113 (1972); Illinois v. Milwaukee, 406 U.S.

91, 93 (1972); and Massachusetts v. Missouri, 308 U.S. 1, 18 (1939).

In the case at hand, the availability of other forums in which to adjudicate the issues presented, the existence of a small group of citizens (Wyoming coal producers or their association) likely to litigate the matter, and the uncompelling nature of the interests asserted, do not necessitate the exercise of this Court's original jurisdiction.

A. THE SO-CALLED "DIRECT" INTEREST ASSERTED BY WYOMING -- SEVERANCE TAX COLLECTIONS -- IS NOT OF SUFFICIENTLY SERIOUS MAGNITUDE TO "NECESSITATE" INVOKING THIS COURT'S DELICATE AND GRAVE ORIGINAL JURISDICTION.

As noted above, the challenged Oklahoma statutes merely require that utilities providing electric power

generated from coal-fired plants located in Oklahoma and sold to Oklahoma consumers, burn a mixture of coal containing a minimum of 10% Oklahoma mined coal, calculated on a British Thermal Unit basis. Okla. Stat. tit. 45, § 939.

The Oklahoma enactment further provides that the cost of coal to the utility shall not exceed the costs of existing long-term contracts for out-of-state coal including preference given Oklahoma vendors, or result in higher rates to Oklahoma consumers. Okla. Stat. tit. 45, § 939.1. Accordingly, the requirement that a 10% mixture be used does not apply if the use of such a mixture would require the utility to pay a cost in excess of the costs of long-term contracts for out-

of-state coal. Thus, depending on the price of coal, the statute may or may not require utilities to use coal mined in Oklahoma.

The challenged statutes do not, as Plaintiff argues, prohibit exportation of Wyoming coal to Oklahoma. Rather, under the statutory scheme, Wyoming producers may export as much coal to Oklahoma as they wish.

Wyoming, arguing that Oklahoma's statutes prohibit the sale of Wyoming coal in Oklahoma, asserts that its severance tax collection will decline as a direct result of Oklahoma's enactment. In examining this interest, it should be noted that there is no direct correlation between the sale of coal by Wyoming producers in Oklahoma, and the collection of Wyoming's

severance tax. The Wyoming tax is not imposed upon the sale of coal, but rather upon the completion of the mining process -- severance. Wyo. Stat. § 39-2-202(a) and (b) (1977). Recognizing that the tax is not imposed on sales, the Wyoming statute specifically provides for a method of evaluation, when the coal being severed is used without sale. Wyo. Stat. § 39-2-202(d) (1977).

Because Wyoming's tax is imposed on severance, not sales, Oklahoma's statutory enactment, even if it could be said to prohibit sales within Oklahoma (which it does not), would not directly affect Wyoming's ability to tax coal when it is severed from the ground.

Wyoming's claim that Oklahoma's law directly injures it is based on three unarticulated assumptions:

1. Consumption of Oklahoma mined coal in Oklahoma will ipso facto result in reduced sales of Wyoming coal in Oklahoma;

2. Reduced sales of Wyoming coal in Oklahoma will ipso facto result in an overall reduction in the sale of Wyoming coal; and

3. Reduced overall sales of Wyoming coal will ipso facto result in reduced severance of coal in Wyoming.

These assumptions, all of which are necessary to Wyoming's claim of "direct injury," show how tenuous and remote any connection between the claimed injury and the Oklahoma enactment is.

Any one or all of the assumptions may prove false, and failure of any assumption would cut off any connection (even indirect connections) between Oklahoma's law and Wyoming's claimed injury.

Wyoming's so-called "direct interest" is remote at best, and hardly the "direct" interest of "serious magnitude and dignity" required to "necessitate" the assumption of original jurisdiction.

The so-called "direct interest" asserted by Wyoming is certainly not included in the typical interests asserted in original action, such as: disputes over state boundaries, water rights, escheat property, or similar claims related to a state's proprietary interest. Nor is the interest pre-

sented the "makeweight" interest of a consumer. See Georgia v. Pennsylvania, 324 U.S. 439, 450 (1945); and Georgia v. Tennessee Copper Company, 206 U.S. 230, 237 (1907).

The so-called "direct injury" asserted by Wyoming is not an injury directly or necessarily resulting from Oklahoma's statutory enactment. Even if Oklahoma's laws were to have an incidental effect on the amount of coal that producers severed from the ground in Wyoming, such would not directly affect Wyoming's power to tax. If such were to occur, the Wyoming Legislature could make whatever adjustments it deems necessary to insure the

collection of adequate revenue to meet the State's needs.[2]

In sum, the so-called direct interest asserted by Wyoming is not an interest of serious magnitude necessitating the exercise of this Court's original jurisdiction. Nor does the parens patriae interest asserted by Wyoming rise to such magnitude.

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[2] Any failure on the part of the Legislature to act in such a case, may well make any incidental damage a self-inflicted injury. Such injuries are not actionable. This Court held in Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976), that a state may not be heard to complain about damage inflicted by its own hand.

B. THE PARENS PATRIAE INTERESTS ASSERTED BY WYOMING ARE NOT OF SUFFICIENT SERIOUSNESS TO NECESSITATE THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION. THIS IS PARTICULARLY TRUE IN LIGHT OF THE EXISTENCE OF A SMALL GROUP OF CITIZENS LIKELY TO CHALLENGE OKLAHOMA'S LAW (THE WYOMING COAL PRODUCERS OR THEIR ASSOCIATION), AND THE AVAILABILITY OF ALTERNATE FORUMS IN WHICH THE ISSUES PRESENTED CAN BE LITIGATED.

A state is not permitted to enter a controversy as a nominal party in order to forward the complaint of its individual citizens. See e.g., Maryland v. Louisiana, 451 U.S. 725, 737 (1981); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 394 (1938); and New Hampshire v. Louisiana, 108 U.S. 76, 90-91 (1883). A state may, however, act as a representative of its citizens in original actions where the injury affects the general population

of a state in a substantial way. See e.g., Maryland v. Louisiana, supra at 737; State of Georgia v. Pennsylvania Railroad Company, 324 U.S. 439, 449-50 (1945); Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923); and Missouri v. Illinois, 180 U.S. 208, 241 (1901).

In Pennsylvania v. West Virginia, supra, the threat complained of was complete cessation of natural gas delivery, and thus could be said to directly and seriously affect the health, safety and welfare of the citizens in general. In State of Georgia v. Pennsylvania, the complained of injury was pervasive railroad rate price fixing resulting in direct harm to all citizen consumers. In Maryland v. Louisiana, the complained of injury was the direct imposition of a "first-

use" tax on certain uses of natural gas, which was meant to be, and was in fact, passed on to all citizen consumers. Thus the parens patriae interest advanced was a direct increase in cost to all natural gas consumers.

In Missouri v. Illinois, it was a health menace to the entire state from the spread of contagious disease such as typhoid that was advanced.

No such serious interest exists in the case now before the Court.

In the case at hand, the asserted parens patriae interests are the citizens' interest in state revenue collection, the state subdivisions' interest in revenue collection, and a generally asserted interest in maintaining energy-related industries.

These asserted parens patriae interests are just as remote and tenuous as the so-called direct interest asserted by Wyoming. All rely on the same three assumptions as Wyoming's so-called direct interest. The asserted interests simply do not establish sufficient direct links between the challenged statutes and the alleged harm or the health, safety or welfare of the general population. This is particularly true in light of the fact that the issues presented can be raised in alternative forums, by Wyoming coal producers.

In determining if the case "necessitated" the assumption of original jurisdiction, this Court in Maryland v. Louisiana particularly noted the absence of a small group of

citizens who were likely to challenge the tax directly. In the case at hand, the Wyoming coal producers or the Wyoming Mining Association constitute a small group of citizens likely to challenge Oklahoma's statutes.

It should be noted here that coal producers or their association would have other forums available in which to make such a challenge. Federal district courts would be available to them, just as they were available to the plaintiff in Hunt v. Washington State Apple Commission, 432 U.S. 333 (1977).[3] Additionally, the state courts of Oklahoma would also be

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[3] In point of fact, the law firm of Holland and Hart, on behalf of the Wyoming Mining Association, has written Oklahoma's Attorney General seeking permission to file an amicus curiae brief in support of Wyoming's position in this case.

available to them. Okla. Const. art. II, § 6; and Okla. Stat. tit. 12, § 1651. Thus, a forum would exist in which the issues presented could be litigated elsewhere. See Arizona v. New Mexico, 425 U.S. 794, 798 (1926).

This Court's original jurisdiction, which is evoked sparingly, is exercised in appropriate cases where required by the strictest necessity. In the case at hand, neither the so-called direct interest of Wyoming, nor the parens patriae interest of Wyoming are serious enough in magnitude to "absolutely necessitate" the exercise of this Court's jurisdiction. Accordingly, jurisdiction should not be assumed.

PROPOSITION II.

OKLAHOMA'S STATUTE CONCERNING THE USE OF OKLAHOMA COAL IN OKLAHOMA BASED PUBLIC UTILITIES IS PART OF THE STATE'S REGULATION OF RETAIL RATES CHARGED BY PUBLIC UTILITIES EXPRESSLY AUTHORIZED BY CONGRESS AND IS IMMUNE FROM COMMERCE CLAUSE ATTACK.

A. TITLE 45, §§ 939 AND 939.1 OF THE OKLAHOMA STATUTES REQUIRE THAT OKLAHOMA ELECTRIC UTILITIES PROVIDING POWER TO OKLAHOMA CONSUMERS BURN 10% OKLAHOMA MINED COAL ONLY IF THERE IS NO INCREASED COST TO THE OKLAHOMA CONSUMER.

In its brief, the State of Wyoming has tried to characterize Oklahoma's statutes as an absolute requirement that Oklahoma utility companies burn 10% Oklahoma mined coal. Wyoming also attempts to use the wording of a legislative resolution to demonstrate legislative intent even though the resolution was not enacted during the same legislative session and does not

constitute a law or other expression of intent of the Oklahoma Legislature.

Without quoting the statute at length Oklahoma mandates that 10% of the coal burned by Oklahoma utilities providing power to Oklahoma consumers must be mined in Oklahoma under certain conditions. This requirement is limited by the fact that purchase of Oklahoma coal by such utilities may not increase the cost to Oklahoma consumers. Oklahoma's motivation is clearly an attempt to motivate Oklahoma utilities to begin burning domestic coal but Oklahoma is equally concerned that the cost to its ratepayers not suffer. In other words, Oklahoma has not enacted a blind preference solely for the benefit of Oklahoma coal companies no matter what the cost.

After reading the brief of the State of Wyoming, one would think that Oklahoma had declared war on Wyoming coal producers. In buttressing its arguments Wyoming has erroneously relied on a resolution of the Legislature in 1985 which does not form the basis for any legislative history for the statutes they attack. The statutes under attack are §§ 939 and 939.1 of Title 45 of the Oklahoma Statutes passed in 1986. Both statutes were passed as part of one bill, Senate Bill No. 458, 1986 Okla. Sess. Laws, 73. The Oklahoma Senate Resolution cited by the State of Wyoming in its brief was passed the year before in 1985. It was never signed by the Governor and never became law.

In Oklahoma such a legislative resolution is merely an expression of opinion and has no force or effect of law. Hawks v. Bland, 9 P.2d 720 (Okla. 1932). Only measures passed by both houses of the Legislature and then signed by the Governor become law in Oklahoma. Oklahoma News Co. v. Ryan, 224 P. 969 (Okla. 1924). Most importantly this 1985 resolution does not even constitute part of the legislative history of the 1986 act. Oklahoma really has no such legislative history in the form of committee reports or other expressions of legislative intent. Even legislative resolutions such as that cited in Wyoming's brief may not be used to express legislative intent. Stephens

Produce Co. v. Stephens, 332 P.2d 674 (Okla. 1958).

While the enactment of these statutes assisted the Oklahoma coal industry in becoming competitive it was not the primary intent of the law. As will be discussed later, Oklahoma's primary long term goal is to assist the Oklahoma electric ratepayers by reducing Oklahoma's reliance on a single source of coal.

B. CONGRESS HAS GIVEN AUTHORITY TO THE FEDERAL ENERGY REGULATORY COMMISSION TO SET WHOLESALE ELECTRIC UTILITY RATES, BUT HAS EXPRESSLY LEFT THE REGULATION OF RETAIL RATES AND OTHER REGULATORY MATTERS CONCERNING DOMESTIC UTILITY COMPANIES, TO THE STATES.

Since 1935, with the creation of the Federal Power Commission, Congress has specifically delineated the extent to which states may regulate public

utility companies and the rates charged consumers. Federal jurisdiction over public utilities generating electricity is now vested with the Federal Energy Regulatory Commission. 16 U.S.C. § 824 (1982). This statute provides in pertinent part as follows:

> (1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy . . .

(Emphasis added.) 16 U.S.C. § 824(b)(1)(1982). Between 1935 and 1983, the line between state and federal jurisdiction was quite clear. The states had jurisdiction over retail rates charged to its citizens and the federal government had jurisdiction over wholesale rates charged by utility

companies. In Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983), this Court recognized a state's broader jurisdiction over public utility companies generating electricity within its borders. In this case the court upheld Arkansas' jurisdiction over wholesale rates of the Arkansas Electric Cooperative.

Even though allowing Arkansas to regulate wholesale rates had some effect on interstate commerce, the court noted that the state's traditional role in regulating public utilities had no negative impact on the nation's commerce.

> Finally, although we recognize that the PSC's regulation of the rates AECC charges to its members will have an incidental effect on interstate commerce, we are convinced that "the burden

> imposed on such commerce is not clearly excessive in relation to the putative local benefits." Part of the power AECC sells is received from out-of-state. But the same is true of most retail utilities, and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States.

461 U.S. at 395. Oklahoma has clear authority to regulate retail electric rates and other utility matters which have only incidental effects on interstate commerce.

C. AS CONGRESS HAS LEFT JURISDICTION OVER RETAIL ELECTRIC RATES CHARGED BY ELECTRIC UTILITY COMPANIES TO THE STATES IN ADDITION TO OTHER REGULATORY MATTERS OVER THESE COMPANIES, OKLAHOMA STATUTES NECESSARY IN CARRYING OUT ITS RATEMAKING JURISDICTION ARE IMMUNE FROM COMMERCE CLAUSE ATTACK.

As previously stated, 16 U.S.C. § 824 (1982) essentially carves out

jurisdiction over certain electric utility matters and gives it to FERC. The federal government (through FERC) has no power to prescribe retail electric rates charged by electric utility companies. Federal Power Commission v. Conway Corp., 426 U.S. 271, 276 (1976). All other matters in the regulation of electric utilities are left to the states.

Even though the Commerce Clause is an affirmative grant of power to Congress to regulate interstate commerce, Article I, § 8, cl. 3, unquestionably limits a state's ability to burden or interfere with interstate commerce in the absence of Congressional action. Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648,

652 (1981); and Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980). Congress' power over commerce, however, also allows it to delegate the regulation of certain aspects of commerce to the states. As this Court held in White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983):

> Congress, unlike a state legislature . . . , is not limited by any negative implications of the Commerce Clause . . . Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause. . .

460 U.S. at 213. In Western & Southern, this Court analyzed a California "retaliatory" tax imposed on certain out-of-state insurance companies and not imposed on California companies. Congress had previously

passed a statute which specifically left the regulation of insurance companies to the states. In rejecting the Commerce Clause arguments in this case this Court held as follows:

> If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.

(Emphasis added.) 451 U.S. at 652, 653. See Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System, 472 U.S. 159 (1985).

In order to regulate the retail rates charge domestic utility companies to its citizens, the State of Oklahoma must insure that its utility companies have as many available markets as possible. Reliance on out-of-state coal or simply one market source could

eventually lead to an uncomfortable reliance on the prices charged by companies beyond the control of the state. This very legitimate concern about supplies being cutoff by an out-of-state producer was recognized as a legitimate concern in Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951).

The regulation of domestic public utilities and the rates they charge consumers is unlike other forms of state regulation since utilities are really a regulated monopoly. The Oklahoma consumers do not have a choice in where Oklahoma utilities purchase their coal. In Oklahoma, the goal of utility regulation is to insure the lowest possible utility rates for its

ratepayers by preventing needless duplication of facilities that could result in increased cost to these ratepayers. See Data Transmission Co. v. Corporation Commission, 561 P.2d 50, 54 (Okla. 1977). This Court has recognized that ". . . the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Electric Cooperative, 461 U.S. at 377.

In Panhandle Eastern Pipeline Co., this Court upheld the State of Michigan's action in preventing an out of state pipe .line company from directly selling to its consumers. The court recognized the long standing principle that the sale of gas or utility service to local customers is

essentially a local concern and subject to state regulation. The court also recognized that the absence of regulation in the public utility area can ultimately result in higher cost to ratepayers.

The State of Oklahoma has determined that an effective and helpful way of ensuring lower utility rates is to seek more competitive prices for coal and a multitude of markets for coal. To accomplish this Oklahoma requires Oklahoma based utilities to burn a small percentage of Oklahoma coal and only if it is cost effective. This minimal requirement is well within Oklahoma's authority to regulate retail rates of electric utilities recognized by Congress. It may not be attacked on

Commerce Clause grounds.

PROPOSITION III.

ANY ALLEGED DISCRIMINATION FROM REQUIRING OKLAHOMA UTILITIES TO BURN A SMALL AMOUNT OF OKLAHOMA COAL IS JUSTIFIED BY THE NEED FOR MULTIPLE MARKETS FOR COAL SUPPLIES.

As stated previously, the Commerce Clause grants Congress the right to regulate commerce among the states, but acts as a limitation on a state's ability to burden or interfere with state commerce. Maine v. Taylor, 477 U.S. 131 (1986). This limitation on a state's power, however, will not prevent a state from regulating matters of legitimate local concern. Maine v. Taylor, 477 U.S. at 138; and Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 350 (1977). Essentially if a state statute is found to discriminate against interstate

commerce, the state must show that the statute serves a legitimate local purpose and that the purpose cannot be served by other non- discriminatory ways. Maine v. Taylor , 477 U.S. at 138; Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); and Hunt v. Washington State Apple Advertising Commission, 432 U.S. at 350. Put in a slightly different way, states have the authority to legislate matters of local concern even if the legislation has some effect on interstate commerce, if Congress has not acted. Lewis v. BT Investment Managers, Inc., 447 U.S. at 36; and City of Philadelphia v. New Jersey, 437 U.S. 617, 623-624 (1978). There must be a reason for the discrimination

against articles of interstate commerce apart from their origin. Lewis v. BT Investment Managers, Inc., 447 U.S. at 36; and City of Philadelphia v. New Jersey, 437 U.S. at 626-627.

In order to keep utility rates at a minimum over the long term, it is vital that the State of Oklahoma have a variety of coal markets. Clearly, the more markets that are available, the more competitive the price will be. Multiple markets will also limit the impact of Oklahoma utilities relying on a single market source. Setting aside a small portion of coal purchases by utilities for Oklahoma based coal fosters these legitimate local purposes.

Oklahoma's statute is far less burdensome than other state legislation

struck down by this Court and even some statutes approved by this Court. Oklahoma is not cutting Wyoming off from Oklahoma's markets and is not placing an overall burden on Wyoming coal producers in doing business in Oklahoma. This Court has struck down several state statutes where a state has attempted to completely ban a particular article of interstate commerce. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (complete ban on exportation of hydroelectric power); City of Philadelphia v. New Jersey, (complete ban on the importation of most solid and liquid waste); and Hughes v. Oklahoma, (complete ban on the exportation of minnows taken from Oklahoma waters). Similarly this

Court has upheld bans on certain articles of interstate commerce far more intrusive than the legislation state at issue in this case. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (complete ban on producers and refiners of petroleum products operating retail service stations); Maine v. Taylor, (complete ban on the importation of live bait); and Minnesota v. Clover Leaf Creamery, (complete ban on the sale of milk in plastic, non-returnable containers).

It would certainly be a different case indeed if Oklahoma attempted to ban all importation of coal or if Oklahoma assessed a tax on imported coal that it did not assess on Oklahoma coal. Rather than place an overall burden on interstate commerce Oklahoma

has chosen to require its domestic utility companies to use a small amount of Oklahoma coal and only if the costs justify it. This slight burden on interstate commerce is completely justified in holding electric utility rates down and avoiding possible disruption of electric service through dependence on one energy source.

PROPOSITION IV.

EVEN ASSUMING OKLAHOMA STATUTES IMPROPERLY DISCRIMINATE AGAINST INTERSTATE COMMERCE THIS STATUTE IS STILL CONSTITUTIONAL AS APPLIED TO PURCHASES BY THE GRAND RIVER DAM AUTHORITY WHICH IS A STATE OWNED PUBLIC UTILITY.

The Grand River Dam Authority is a state owned and operated agency. Okla. Stat. tit. 82, § 861. One of the coal fired electric plants mentioned by the State of Wyoming in its brief is maintained and operated by the Grand

River Dam Authority. Initially it should be pointed out that the jurisdiction of FERC does not generally extend to the state's, authorities or instrumentalities of states, unless a specific provision brings them under FERC jurisdiction. 16 U.S.C. § 824(f) (1982). Secondly, since the Grand River Dam Authority is owned and operated by the State of Oklahoma the same general Commerce Clause principles do not apply. This Court has long recognized the difference between states acting as market participants and as market regulators. When the State of Oklahoma, makes purchases of coal through its agency, the Grand River Dam Authority, it may indeed favor Oklahoma citizens in making such purchases.

In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), this Court dealt with a case where the State of South Dakota temporarily confined its sales of cement at a state owned cement plant, to state residents. In upholding South Dakota's preference for its own residents this Court held as follows:

> The basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place. [citations omitted.] There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

447 U.S. at 436, 437. See also White v. Massachusetts Council of Construction Employers, Inc., 460 U.S.

204 (1983); and Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

It is interesting to point out that the State of Wyoming successfully defended its own state purchasing preferences for its own citizens recently in State v. Antonich, 694 P.2d 60 (Wyo. 1985); and Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital, 641 P.2d 745 (Wyo. 1982).

Even assuming Oklahoma's domestic coal preference statute may not be constitutionally applied to privately owned utilities, it is certainly constitutional as applied to coal purchases of the Grand River Dam Authority.

CONCLUSION

This Court should not assume original jurisdiction because Wyoming has not advanced sufficient sovereign interests to protect and its domestic coal producers have an available forum to litigate the issue. Oklahoma's statute serves legitimate local purposes and was enacted pursuant to congressional authorization. If Oklahoma must defend its statute it should be done through the course of normal litigation where the facts may be fully analyzed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STATE OF WYOMING,
Plaintiff,
v.
STATE OF OKLAHOMA,
Defendant.

MOTION OF WYOMING MINING ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF IN SUPPORT OF MOTION OF STATE OF WYOMING FOR LEAVE TO FILE COMPLAINT

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OCTOBER TERM, 1987

No. 112, Original

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v.

STATE OF OKLAHOMA,

Defendant.

MOTION OF WYOMING MINING ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF MOTION OF STATE OF WYOMING FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 36.1, the Wyoming Mining Association ("Association") respectfully requests the Court's consent to file the accompanying brief as *amicus curiae* in support of Plaintiff, the State of Wyoming. The attorney for the State of Wyoming has consented to the filing of the accompanying brief of the Association.[1] The attorney for the Defendant, the State of Oklahoma, refused to grant consent.

The State of Wyoming has challenged an Oklahoma statute requiring that at least ten percent of the coal burned by Oklahoma electric utilities be coal produced in Oklahoma. The Association includes Wyoming coal mining companies that had provided the full requirements of coal used by Oklahoma utilities prior to the local content initiative. As the major suppliers of coal to Oklahoma, and as suppliers to other states which might be influenced to enact similar legislation, the Association's members have an interest in the Court determining

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[1] The statement of consent of Counsel for the State of Wyoming has been filed with the Clerk of the Court.

whether Oklahoma's protectionist legislation is an unconstitutional interference with interstate commerce.

The State of Wyoming has challenged the Oklahoma statute on grounds that the law is an unconstitutional interference with interstate commerce. As an association of coal producers whose market has been intentionally diverted to Oklahoma coal producers by the State of Oklahoma for blatantly economic protectionist purposes, the Association can demonstrate the effects of the Oklahoma action on interstate commerce. In addition to the impact on the State of Wyoming of lost severance tax revenues,[2] the adverse economic effects of the Oklahoma statute are borne by Wyoming coal producers.

While the Complaint of the State of Wyoming rests on Commerce Clause arguments, the Association believes the Court also should consider other broad national concerns, such as national environmental policy, raised by the Oklahoma statute.

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June 13, 1988

[2] The Association notes that the State of Wyoming is also likely to lose revenues from shared royalties from the large number of federal leases involved in Wyoming coal production.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 112, Original

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

BRIEF OF AMICUS CURIAE WYOMING MINING ASSOCIATION IN SUPPORT OF MOTION OF STATE OF WYOMING FOR LEAVE TO FILE COMPLAINT

INTEREST OF THE AMICUS CURIAE

In 1986 the State of Oklahoma enacted a law, effective January 1, 1987, requiring that at least ten percent of the coal burned by Oklahoma electric utilities be coal mined in Oklahoma.[1] The Oklahoma law, which is at issue in the Complaint of the State of Wyoming, interferes with existing sales and presents a barrier to future sales between Wyoming coal producers and Oklahoma utilities. The Wyoming Mining Association ("Association") is composed of companies which produce coal in Wyoming, and includes companies which sell coal to Oklahoma utilities. The law thus imposes economic injury on members of the Wyoming Mining Association, who previously had furnished virtually all of the coal used in the boilers of Oklahoma electric utilities and whose sales

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[1] OKLA. STAT. tit. 45 § 939 (Supp. 1986).

to those utilities have declined by approximately 12 percent.

The Association's members fear that, if the law is not invalidated swiftly and definitively by the Court, similar initiatives in other states will be enacted, erecting market barriers to coal across the nation as coal-producing states attempt to protect domestic coal production and sales. Furthermore, protectionist measures patterned after the Oklahoma coal industry precedent may be extended to other industries, obstructing market access to an unlimited variety of commodities.

Because of the existing and future deleterious effects of the Oklahoma protectionist statute on Wyoming coal producers, the Association supports the Motion of the State of Wyoming for Leave to File Complaint. Moreover, because of the national scope of the economic injury and interference with free flow of commerce that may result if this statute is not invalidated, and the direct conflict with national air quality policy posed by the statute, the Association urges the Court to recognize the national ramifications of Oklahoma's action and accept jurisdiction.

SUMMARY OF ARGUMENT

The Oklahoma statute challenged by the State of Wyoming erects an absolute barrier to a segment of the Oklahoma coal market that has historically been served by Wyoming coal producers. As a result it has imposed a significant burden on commerce between the two states to the benefit of Oklahoma coal producers and to the detriment of the State of Wyoming, including its coal producers. The effects of the Oklahoma protectionist measure, if allowed to stand, are national in scope, posing the threat of "me too" legislation by other states with other commodities, that will impede the free flow of commerce between the states. Aside from impermissibly interfering with interstate commerce, the Oklahoma stat-

ute also threatens the integrity of important national environmental policy.

The scope and significance of the impacts, both real and potential, of the Oklahoma statute compel a decisive and expeditious response that only the Court, by asserting its original jurisdiction, can provide.

ARGUMENT

There is no question that Oklahoma's statute constitutes facially discriminatory economic protectionism—a form of interference with interstate commerce that is prohibited *per se*. The brief of the State of Wyoming presents the constitutional question and addresses the Court's original and exclusive jurisdiction without need for amplification by the Association. The Association concurs with and supports Wyoming's brief on these matters. The Association seeks to address the Court to emphasize that this case presents a claim of the appropriate "seriousness and dignity" [2] to warrant the critical scrutiny of the Court.

I. THE BURDEN ON INTERSTATE COMMERCE IMPOSED BY THE OKLAHOMA STATUTE IS SIGNIFICANT AND REAL

The nature, intent and actual effect of the Oklahoma statute is discrimination for economic purposes in favor of Oklahoma coal producers and against Wyoming coal producers. The statutory mandate for Oklahoma electric utilities to burn a mixture containing at least ten percent Oklahoma coal was the culmination of legislative efforts dating from 1985 to reduce coal purchases specifically from Wyoming.[3] Prior to the local content initiatives,

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[2] *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

[3] *See* Brief of State of Wyoming in Support of Motion for Leave to File Complaint, Appendix at A-11, A-12. The 1986 statute may not be the final word by Oklahoma on the matter, however. *See*

Wyoming coal satisfied 100 percent of the coal requirements of Oklahoma electric utilities.[4] Therefore, the impact of the ten percent reduction in the Oklahoma electric utility market will be borne almost exclusively by Wyoming and its coal producers.

Compliance by Oklahoma utilities with the ten percent requirement has resulted in a 12 percent decline in sales to Oklahoma utilities by Wyoming coal producers since 1985, representing lost sales amounting to approximately 1.5 million tons of coal, compared to the 1985 Oklahoma sales. Rather than serving 100 percent of the Oklahoma utility market, Wyoming sales to Oklahoma utilities decreased to 90 percent in 1987. While a ten percent loss of market share in one market is itself dramatic and economically critical, the extent of the injury is compounded by the fact that Oklahoma represents a large proportion of the total market for Wyoming coal sales. Exports to other states represent more than 84 percent of Wyoming coal sales. Prior to the Oklahoma domestic coal content requirement, Oklahoma was Wyoming's fourth largest export coal customer, representing approximately 11 percent of the export market for Wyoming coal.

The result of the ten percent mandate is that ten percent of the pre-1986 Oklahoma market for Wyoming coal has been directly and deliberately shut off and has now become a captive market for Oklahoma coal producers. This intended result occurs despite the higher

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Oklahoma Senate Concurrent Resolution No. 45, 1st Session (1987), appended, finding that the ten percent requirement has been an effective economic development initiative, and seeking to develop additional markets for Oklahoma coal, including reviewing the ten percent requirement.

[4] Data regarding Wyoming coal sales to Oklahoma utilities was derived from Department of Energy/Energy Information Administration *Coal Distribution Report*, EIA Publication No. 0125, for years 1984-87.

cost[5] and inferior environmental characteristics[6] of Oklahoma coal compared to Wyoming coal.

The effect on sales of Wyoming coal to Oklahoma demonstrates that the Oklahoma statute erects a barrier to the free flow of commerce between Oklahoma and Wyoming. Such blatant parochial favoritism is the essence of state economic protectionism that is anathema to the federal system of government. The authors of the Constitution sought to preclude precisely this result by providing for the regulation of interstate commerce exclusively by Congress. The Court has consistently struck down such parochial initiatives.

II. THE POTENTIAL BURDEN ON INTERSTATE COMMERCE IF THE OKLAHOMA STATUTE IS ALLOWED TO STAND IS NATIONAL IN SCOPE

While the interference with interstate commerce between Oklahoma and Wyoming caused by the Oklahoma statute is obvious, the potential implications if the statute is allowed to stand are national in scope. For this reason alone, it is critical that the Court accept jurisdiction and move decisively to stifle the very real nationwide threat to interstate commerce posed by such discriminatory parochial initiatives.

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[5] The ten percent requirement is not applicable if it would have certain cost consequences to the consumer or to the utility. OKLA. STAT. tit. 45 § 939.1 (Supp. 1986). The meaning of this limitation is controversial. At least one Oklahoma utility is interpreting it to require only that the delivered price of the Oklahoma coal not exceed the cost of Wyoming coal by more than five percent. Thus, the total additional cost, including the higher price and the extra costs of burning and controlling pollution emissions from Oklahoma coal, is not considered. *See* "AMAX Nears GRDA Award; Dispute Lingers Over 'Buy Oklahoma' Law Interpretation," *Coal Week*, Vol. 14, No. 19 (May 9, 1988); "Grand River Dam Coal Purchasing Policy Straddles Conflicting Oklahoma Laws," *Id.*, Vol. 14, No. 20 (May 16, 1988).

[6] *See* n.11, *infra*.

The brief of the State of Wyoming noted that local coal legislation is being considered in some form by at least two other states, Kansas and Missouri. The Association understands that other states, including Alabama, Arkansas, and Louisiana, have also enacted or are considering similar legislation.[7] If Oklahoma's law stands, these states and others are likely to look more seriously at such initiatives, posing the likelihood that similar statutes will proliferate among those coal-producing states that are net coal importers. The possibility raises the spectre of coal-producing states that are net importers lining up against their coal-producing-state suppliers, and the inevitable retaliatory measures that will ensue. Such reasonably foreseeable effects would impose a series of bars to the movement of coal in interstate commerce,[8] obstructing the benefits of free trade among the states.

A balkanization in coal trade may well develop if protectionist legislation such as Oklahoma's is allowed to stand. This effect is likely because of the quality characteristics of coal that make coal mined in one area of the country more desirable for a certain purpose than coal mined in another area. For example, Wyoming coal has low sulfur content, a desirable characteristic for utilities and other industrial coal-fired boiler users attempting to meet state and federal sulfur dioxide emission limitations. States in producing areas where the characteristics of the coal make it less marketable may follow Oklahoma's lead if this statute is not invalidated. The effect could

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[7] A 1983 Alabama statute requires coal-fired cogenerators in the state to purchase only coal produced in Alabama. ALA. CODE § 37-12-5 (1986 Supp.). A 1987 Arkansas statute imposed local content requirements on Arkansas electric utilities similar to those of Oklahoma. General Acts of Arkansas, 1987 Arkansas Act 553 (1987).

[8] The current interstate commerce in coal is substantial. Out-of-state shipments of coal by the 20 coal-exporting states represented 56 percent of total electric utility coal in 1986. National Coal Association, *Steam Electric Plant Factors* (1987), at I-10 - I-13.

be that market access to entire regions of the country is restricted or closed to coal producers in other regions.

Furthermore, if a ten percent local content requirement is allowed to stand, states will be tempted to enact even more stringent requirements, mandating 50 percent or even total local content.[9] And if a local coal content statute is allowed to stand, what is to preclude states that are net importers of other locally-produced resources or commodities from protecting local industry by mandating local content? Such possibilities are logical outgrowths of the Oklahoma action, and yet they completely eviscerate the bar against state regulation of interstate commerce.

III. THE OKLAHOMA STATUTE CONFLICTS WITH IMPORTANT NATIONAL POLICY

In addition to the Commerce Clause issue, this case presents a policy question of national importance. The Oklahoma action severely constrains the ability of Oklahoma utilities, as sources of air pollution, to maintain and improve air quality. This result directly conflicts with the nation's goal "to protect and enhance the quality of the nation's air resources." [10]

Oklahoma coal is higher in sulfur content than the very low sulfur coal produced in Wyoming. It is likely that a major reason Oklahoma utilities purchase Wyoming coal is its low sulfur content, which allows emission sources to meet sulfur dioxide emission limitations with little or no additional abatement measures.[11] By

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[9] *See, e.g.*, the Alabama statute discussed above at n.7. The Association understands consideration has been given in Oklahoma to introduction of legislation raising the ten percent minimum local content requirement to 15 percent. *See also* n.3.

[10] Clean Air Act, Section 101, 42 U.S.C. § 7401.

[11] The annual average sulfur dioxide emission rate of Wyoming coal is 0.92 pounds of sulfur dioxide per million British thermal

restricting its utilities' ability to meet air quality limitations by using low sulfur coal, the State of Oklahoma is either imposing on the utilities the cost of the additional pollution control equipment necessary to achieve an equal level of emissions,[12] or is requiring them to forego the additional increment of sulfur dioxide abatement they were able to achieve before with almost exclusive use of Wyoming coal.

The vehicle chosen by the State of Oklahoma to protect its coal industry is therefore not only an impermissible burden on interstate commerce, but also thwarts an important federal policy to protect and enhance the Nation's air.

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units ("Btu"), compared to 4.63 pounds of sulfur dioxide per million Btu of Oklahoma coal. *See* National Coal Association, *Steam Electric Plant Factors* (1987), at I-12, 13.

[12] A separate, but related, consideration is the impact on utility operations and equipment integrity of mandating the burning of coal of a type the boilers and other equipment were not designed to burn. Boilers are frequently designed to specifications tailored to characteristics of coal from specific mines. Burning coal from other mines may result in less efficient burning and may lead to equipment malfunction and increased maintenance costs.

CONCLUSION

The broad national implications, the significant barrier to interstate commerce, and the substantial threat to federalism posed by the Oklahoma statute provide compelling bases for the Court to grant the motion of the State of Wyoming for leave to hear its complaint.

Respectfully submitted,

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June 13, 1988

APPENDIX

STATE OF OKLAHOMA

1st Session of the 41st Legislature (1987)

SENATE CONCURRENT
RESOLUTION NO. 45

BY: STIPE of the SENATE

and

GLOVER and BARKER
of the HOUSE

AS INTRODUCED

A CONCURRENT RESOLUTION STATING LEGISLATIVE INTENT ON INTERIM STUDY CONCERNING THE MARKETING OF OKLAHOMA COAL; ADVISING SAID COMMITTEE TO STUDY CURRENT LAW; MAKING A PERMANENT RECORD; AND DIRECTING DISTRIBUTION.

WHEREAS, the 1986 law, mandating electric utilities with coal-fired generating plants to burn at least ten percent Oklahoma coal (Sections 939 and 939.1 of Title 45 of the Oklahoma Statutes) has been an economic development success story resulting in jobs vital to the State of Oklahoma; and

WHEREAS, the further sale of more Oklahoma coal will result in even greater economic benefits; and

WHEREAS, the development of new markets for Oklahoma coal such as those provided by the 1986 "10 percent burn" law is indicative of economic diversification; and

WHEREAS, developing other markets for Oklahoma coal outside the state boundaries will create even more jobs and economic fruits for the State of Oklahoma.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE 1ST SESSION OF THE 41ST OKLAHOMA LEGISLATURE, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:

THAT a joint committee be created of the House of Representatives and the Senate to undertake an interim study to learn more about assisting the development of new markets for Oklahoma coal.

THAT said interim study also include a review of the 1986 "10 percent burn" law.

THAT a copy of this resolution be spread upon the pages of the permanent journal of the Oklahoma State Senate and the Oklahoma House of Representatives of the 1st Session of the 41st Oklahoma Legislature.

THAT a copy of this resolution be distributed to the Governor and the Lieutenant Governor.

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In The

Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

MOTION OF ALABAMA POWER COMPANY, A CORPORATION, FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT AND AMICUS CURIAE BRIEF

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MOTION OF ALABAMA POWER COMPANY, A CORPORATION, FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

Alabama Power Company, a corporation, (hereinafter, APCo) respectfully moves this Court, pursuant to Rule 36.1, for leave to file the accompanying brief in this case as amicus curiae. The attorney for the Plaintiff State of Wyoming consents to the filing of an amicus curiae brief, and his letter of consent is attached to the original, signed copy of this motion. The attorney for the Defendant State of Oklahoma refuses to consent to this filing.

This action seeks to invalidate an Oklahoma law (hereinafter, the Act) that requires utilities generating and selling electricity in Oklahoma to burn a mixture containing a minimum of ten percent Oklahoma-mined coal in their coal-fired generating plants. APCo is an electricity-producing utility that purchases coal on the interstate market. As a purchaser of coal in the interstate market, and as a producer of electricity from coal-fired plants, APCo has an interest in this Court determining the constitutionality of Oklahoma's attempt to interfere by way of legislation, for reasons unrelated to legitimate state goals such as health or safety, with the operations of the interstate coal market and of privately owned utilities.

The Plaintiff's brief in support of its motion for leave to file a complaint argues that the Act violates the Commerce Clause of the Constitution of the United states. APCo contends, on the basis of the factual

allegations of Wyoming's complaint, that the Act also violates the Fourteenth Amendment's Equal Protection Clause, and that, unless this motion is granted, the Court may not be alerted to this serious and potentially dispositive argument in the course of deciding whether to accept jurisdiction in this case. APCo's interest in this dispute underscores the seriousness and dignity of Wyoming's complaint, and its brief supports Wyoming's invocation of this Court's exclusive and original jurisdiction. If the Court accepts APCo's argument, the Oklahoma statute at issue in this case must be declared unconstitutional.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

INTEREST OF ALABAMA POWER COMPANY

The Plaintiff State of Wyoming seeks leave to challenge the constitutionality, under the Commerce Clause, of an Oklahoma statute, *Okla. Stat.* tit. 45, §§ 939, 939.1 (Supp. 1986) (hereinafter, the Act).[1] The Act requires Oklahoma utilities that produce electricity from coal-fired plants for sale to Oklahoma consumers to burn a fuel mixture containing at least ten percent coal mined in Oklahoma. Utilities covered by the Act may not pass cost increases along to their consumers.

Alabama Power Company (hereinafter, APCo), a privately owned, state-regulated utility, has a significant and legitimate interest in securing a judicial determination of the constitutionality of any statute that requires, without reference to such legitimate state ends as health and safety, that a utility must use coal originating in a particular state and, concomitantly, that coal from other states may not be used. APCo also has statutory obligations to provide adequate service to its customers and to manage its operations in an efficient and economical manner. (Appendix A - I). These obligations give APCo an additional significant and legitimate interest in determining the constitutionality of statutes that threaten to artificially constrain APCo's business operations, and which are potentially contrary to the interests of its consumers. APCo's interest in this case is made all the more real by

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[1] The text of the Act as codified is found at *Plaintiff's Brief* Appendix A-1.

the fact that legislation effectively similar to the Act was recently introduced in both houses of the Alabama Legislature (Appendix A - II). Although the legislation failed to pass, APCo is concerned that attempts to enact similar legislation will be made in the future unless the unconstitutionality of such state regulations is established.

APCo is particularly wary of the consequences of allowing the Act to survive and similar state laws to proliferate. If Oklahoma can tell utilities in that State that they must obtain at least ten percent of their coal from Oklahoma sources, it can also require the utilities to satisfy fifty or one hundred percent of their coal needs from Oklahoma mines. What Oklahoma can do, other states, too, can do. The Oklahoma Act presents the specter of an epidemic of similar enactments by other states, with each act requiring privately owned regulated businesses that operate or sell in that state to purchase designated amounts of goods and services from suppliers within that state.[2] Such a situation would seriously threaten the federal structure of our national government, because rights would be given or

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[2] In fact, Arkansas recently imposed a quota on utilities in that State similar to Oklahoma's Act. *See* 1987 *Ark. Acts* 553. (Appendix A - VII). The Arkansas law requires coal-fired electricity plants to burn three percent Arkansas-mined coal in 1988, six percent in 1989, and ten percent from 1990 on. Similar laws may be under consideration in Kansas and Missouri. *Plaintiff's Brief* at 17.

denied on the basis of state citizenship rather than national citizenship.[3]

APCo submits this brief to supplement the legal arguments presented in the Plaintiff State of Wyoming's Brief in Support of its Motion for Leave to File a Complaint. APCo fully supports Wyoming's motion and concurs in the arguments presented in Wyoming's brief.

SUMMARY OF ARGUMENT

The purpose of the Oklahoma Act is to promote the economic development of Oklahoma's coal industry at the expense of coal producers in other states. The Act's discriminatory purpose is not a legitimate state objective under the Equal Protection Clause. This is an appropriate case for the Court to exercise its original jurisdiction. Because the Act so directly affects its sovereign interest, the State of Wyoming has *parens patriae* standing to challenge the Act on behalf of its citizens.

[3] Conceivably, the juxtaposition of conflicting requirements imposed by different states could even force APCo to halt interchanges of electricity with utilities in other states. This result would impose a significant hardship, to say the least, on APCo.

ARGUMENT: REASONS FOR GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A COMPLAINT.

A. The Oklahoma Act Violates the Equal Protection Clause.

Traditionally, this Court has tested state economic regulations for soundness under the Equal Protection Clause by inquiring whether a challenged regulation fosters a legitimate state purpose, and, if so, whether the classification imposed by the regulation is rationally related to that purpose. *E.g. Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 667-68 (1981). The Oklahoma Act cannot withstand this inquiry.

The Act's text leaves no possibility for speculation about its purpose: it is intended to create a domestic market for Oklahoma coal producers at the exclusion of coal producers in other states. The resolution entitled "Mines and Minerals – Coal – Domestically Produced Coal" (hereinafter, the Resolution), and passed by the Oklahoma Legislature in 1985, supports this interpretation of the Act's purpose.[4] The Resolution asked Oklahoma utilities to mix ten percent Oklahoma coal with the Wyoming coal used by the utilities in their coal-fired plants.

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[4] The Resolution is reprinted at Appendix A-11 to the Plaintiff's Brief. In addition, see *Plaintiff's Brief* at 14-16 & nn. 18-21, which show that the purposes stated in the Resolution can be fairly ascribed to the Act, because both were products of the same campaign to promote Oklahoma's coal industry at the expense of Wyoming's.

The stated purpose of this request was to "keep[] a portion of ratepayer dollars in Oklahoma and [to] promot[e] economic development" within the State. The Resolution specifically acknowledged the Legislature's intent to foster economic development in Oklahoma by siphoning off money that otherwise would have gone to Wyoming coal producers and Wyoming citizens in the form of payments for coal and severance taxes.

In the same year that Oklahoma's Legislature passed the Resolution, this Court held that a discriminatory purpose like that behind the Resolution "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985). *Ward* involved a preference tax which discriminated in favor of insurance companies located in Alabama at the expense of insurance companies located outside of the State. *Ward*, 470 U.S. at 871. The statute taxed the domestic insurance companies at rates below those paid by the foreign insurance companies. *Ward*, 470 U.S. at 871. The foreign companies challenged the statute under the Equal Protection Clause. *Ward*, 470 U.S. at 872. In response, the State of Alabama attempted to justify the preference tax as a valid effort to promote domestic industry and to encourage investment within the State. *Ward*, 470 U.S. at 873. This Court held that Alabama's discriminatory purpose in enacting the statute violated the Equal Protection Clause:

> In whatever light the State's position is cast, acceptance of its contention that promotion of

> domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business.
>
> . . . .
>
> *We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.*

Ward, 470 U.S. at 882. (emphasis added) (footnote omitted).

Ward is within the mainstream of this Court's equal protection jurisprudence. In *Ward*, the Court found that in the earlier case of *Western & Southern*[5] it had relied on a line of cases to "reaffirm[] the continuing viability of the Equal Protection Clause as a means of challenging a statute that seeks to benefit domestic industry within the State only by grossly discriminating against foreign competitors." *Ward*, 470 U.S. at 879. In addition, the Court "always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.' " *Ward*, 470 U.S. at 878 (quoting *Allied Stores of Ohio. Inc. v.*

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[5] The Court's decision in *Western & Southern* was central to the presentation of issues and the Court's holding in *Ward*. *Ward*, 470 U.S. at 873-75.

Bowers, 358 U.S. 522, 533 (1959) (Brennan, J., concurring)).

Ward governs the equal protection analysis of this case. No less than the discriminatory statute in *Ward*, the Act in this case imposes a classification that discriminates on the basis of residence: Oklahoma coal producers benefit by the Act merely by virtue of their being domestic producers; producers in Wyoming suffer simply because they are foreign to Oklahoma. *See Plaintiff's Brief* at 18 n.23. In this case, as in *Ward*, the state legislature enacted discriminatory legislation for the purpose of developing the State's economy solely by burdening the economies of other states. Consequently, Wyoming coal producers have been excluded from ten percent of the Oklahoma market for fuel for coal-fired plants. As a direct result of this exclusion, the citizens of Wyoming have been deprived of at least nine million dollars annually of the severance taxes that would have been paid to them but for the Oklahoma Act. *Plaintiff's Brief* Appendix A-11,12; *Plaintiff's Brief* at 18. *Ward* shows that under the circumstances of this case, the purpose behind Oklahoma's Act violates the Equal Protection Clause's prohibition of "home team" legislation. *Ward*, 470 U.S. at 878. Oklahoma's Act, therefore, must be struck down.[6]

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[6] In *Ward*, because of the procedural posture of the case when it reached the Court, the Court's holding did not extend to the second part of the rationality test, *e.g.*, determining whether the statute's method was rationally related to its end. *See Ward*, 407 U.S. at 874. However, in *Ward*, as

(Continued on following page)

B. The Court Should Assume Original And Exclusive Jurisdiction.

The validity of the Act, which is aimed at and injurious to the citizens of Wyoming, constitutes a justiciable controversy that warrants the exercise of this Court's original and exclusive jurisdiction. The appropriateness of original jurisdiction in this case is enhanced by the manner in which the Act subverts our federal structure by placing one State's economic interests over the economic interests of the other states. *See Maryland v. Louisiana,* 451 U.S. 725, 739-40 (1981) (regarding appropriateness of original jurisdiction); *see also Allied Stores of Ohio, Inc. v. Bower*, 358 U.S. 522, 532-33 (1959) (Brennan J., concurring) (discussing the Equal Protection Clause as an instrument of federalism) (cited in *Ward*, 470 U.S. at 878). Amicus has discussed in its Statement of Interest the consequences if other states were to enact laws similar to Oklahoma's. Given the possibility of such a result, the Plaintiff's complaint presents a controversy of importance that calls for the exercise of this Court's original jurisdiction. *See Pennsylvania v. West Virginia,* 262 U.S. 553, 596 (1923).

C. Plaintiff Has Parens Patriae Standing.

Plaintiff has standing as *parens patriae* to protect the people of Wyoming from the substantial economic

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(Continued from previous page)

in this case, there was no need to proceed to the second part of the rationality analysis, because no method of accomplishing a state goal can salvage the illegitimate goal of promoting "domestic business by discriminating against nonresident competitors." *Ward,* 470 U.S. at 882.

injury visited upon them by the Oklahoma Act. *See Maryland v. Louisiana*, 451 U.S. at 737. The Oklahoma Act aims to injure Wyoming's coal industry in order to strengthen Oklahoma's. The Plaintiff's Brief ably demonstrates that the economic health of Wyoming's coal industry and the economic health of her people are tightly intertwined. *Plaintiff's Brief* at 12-15, 22-24. Oklahoma's Act will, at the very least, deprive the people of Wyoming of funds necessary for maintaining and building highways, developing and managing water sources, and assisting local governments in the construction of schools and other public projects.

The Act can also reasonably be expected to cause unemployment among Wyoming's miners and in businesses that service the coal industry. Consequently, it will cause a decrease in revenues from taxes that otherwise would have been paid by the newly unemployed, and an increase in the costs of unemployment and other state benefits that must be paid by Wyoming as a result of increased unemployment. Moreover, the injury inflicted by the Act is a permanent one that will grow in its harm to Wyoming's citizens as the demand for electricity in Oklahoma increases over time. In all of these ways, the Act implicates Wyoming's sovereign interests and gives it *parens patriae* standing. *See Pennsylvania v. New Jersey,* 426 U.S. 660, 665 (1976).

CONCLUSION

The questionable constitutionality of the Oklahoma Act, the injury that the Act has inflicted upon the people of Wyoming, and the unfairness of economic regulations that favor the "home team" lead to the conclusion that Plaintiff's motion for leave to file the proposed Complaint should be granted.

Respectfully submitted,

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APPENDIX

ALA. CODE § 37-1-49 (1975)

§ 37-1-49. Duty of utility to render adequate service and maintain facilities.

Every utility shall maintain its plant, facilities and equipment in good operating condition and shall set up and maintain proper reserves for renewals, replacements and reasonable contingencies. Every utility shall render adequate service to the public and shall make such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet the growth and demand of the territory which it is under the duty to serve.

ALA. CODE § 37-1-80 (Supp. 1987)

§ 37-1-80. Rates to be just and reasonable; right of utility to earn fair net return.

The rates and charges for the services rendered and required shall be reasonable and just to both the utility and the public. Every utility shall be entitled to such just and reasonable rates as will enable it at all times to fully perform its duties to the public and will, under honest, efficient and economical management, earn a fair net return on the reasonable value of its property devoted to the public service. For the purpose of fixing rates, such reasonable value of a public utility's property shall be deemed to be the original cost thereof, less the accrued depreciation, as of the most

recent date available. In any determination of the commission as to what constitutes such a fair return, the commission shall give due consideration among other things to the requirements of the business with respect to the utility under consideration, and the necessity, under honest, efficient and economical management of such utility, of enlarging plants, facilities and equipment of the utility under consideration, in order to provide that portion of the public served thereby with adequate service.

SENATE BILL 243 AND HOUSE BILL 175, 1988 REGULAR SESSION OF THE ALABAMA LEGISLATURE.

SYNOPSIS: This bill amends Section 37-1-80, Code of Alabama 1975, relating to rates charged by public utilities, so as to provide a procedure to be used by the Public Service Commission to determine if the purchase of out of state or foreign coal will alter an electric utility's rates and to prohibit the use of foreign coal to serve certain state facilities.

A BILL
TO BE ENTITLED
AN ACT

To amend Section 37-1-80, Code of Alabama 1975, relating to rates charged by public utilities, so as to provide a procedure to be used by the Public Service Commission to determine if the purchase of out of state or foreign coal will alter an electric utility's rates and to prohibit the use of foreign coal to serve certain state facilities.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 37-1-80, Code of Alabama 1975, is hereby amended to read as follows:

"§ 37-1-80.

"*(a)* The rates and charges for the services rendered and required shall be reasonable and just to both the utility and the public. Every utility shall be entitled to such just and reasonable rates as will enable it at all times to fully perform its duties to the public and will, under honest, efficient and economical management, earn a fair net return on the reasonable value of its property devoted to the public service. For the purpose of fixing rates, such reasonable value of a public utility's property shall be deemed to be the original cost thereof, less the accrued depreciation, as of the most recent date available. In any determination of the commission as to what constitutes such a fair return, the commission shall give due consideration among other things to the requirements of the business with respect

to the utility under consideration, and the necessity, under honest, efficient and economical management of such utility, of enlarging plants, facilities and equipment of the utility under consideration, in order to provide that portion of the public served thereby with adequate service.

"(b) Any electric utility subject to regulation by the commission which has purchased coal not mined within the state of Alabama, shall submit a petition on a quarterly basis to the commission requesting that the cost of purchasing and using said coal be considered by the commission as an allowable expense or cost in any system of calculation implemented by the commission to establish rates or in any hearing to determine rates. The petition shall be presented in affidavit form and shall set forth the cost of such coal, the identity of the producer of such coal, the quantity of such coal stated in tons, the average BTU content of such coal, the average sulphur and ash content of such coal, the cost of transportation to be incurred by the electric utility in relation to such coal, and such other information as the commission may deem necessary. The petition shall be open to the public and available for inspection immediately upon its submission to the commission. After receipt of the petition, the commission shall conduct public hearings on a quarterly basis to determine whether the cost of the coal purchased is fair and reasonable in relation to coal otherwise available and produced within the state of Alabama. The burden of proof shall be upon the electric utility submitting the petition. The proof required shall be clear and convincing evidence.

"(c) In the event that the commission determines by clear and convincing evidence taken at the quarterly hearing that the cost of coal so purchased is fair and reasonable in relation to coal otherwise available and produced within the state of Alabama, it shall grant the rate relief requested. In the event that the commission determines that the utility has not provided by clear and convincing evidence that the cost of the coal so purchased is fair and reasonable in relation to coal otherwise available and produced within the state of Alabama, it shall deny the petition and shall disallow in any proceeding or calculations concerning the setting of rates any charges attributable to coal so purchased.

"(d) In comparing the cost of the coal so purchased with the coal otherwise available and produced within the state of Alabama, the commission may not consider as relevant any portion of the cost of coal produced in the state of Alabama which is attributable to standards imposed upon coal producers by virtue of the federal [sic] Surface Mining Control and Reclamation Act of 1977, or the Federal Mine Safety and Health Act of 1977, or other applicable federal or state laws if substantially identical standards are not imposed upon the producer of the coal so purchased.

"(e) In determining whether the cost of the coal purchased is fair and reasonable, the commission shall take into account the benefits derived by customers of the electric utility from revenues to the state of Alabama and to its political subdivisions from the production of coal within the state of Alabama.

"(f) No utility which provides electricity or heat to a state-owned facility shall use coal mined in a foreign country for the purpose of generating electricity or providing heat. As used herein, the phrase 'stated-owned facility' means a building, factory, or other structure owned by the State [sic] of Alabama or by any agency, authority, board, department, school, college, university, county, municipality or other governmental entity organized or constituted pursuant to the laws or ordinances of the State of Alabama or of a subdivison, county or municipality thereof.

"(g) The commission shall promulgate all rules and regulations necessary to implement this section and to provide for the participation of all interested parties. Any person or entity may intervene and participate in any hearing described herein or held pursuant to this act."

Section 2. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

1987 ARK. ACTS 553

For An Act To Be Entitled

"AN ACT TO REQUIRE ALL ELECTRIC UTILITIES IN ARKANSAS SELLING ELECTRICITY TO CONSUMERS IN ARKANSAS AND OPERATING COAL-FIRED ELECTRIC GENERATING PLANTS IN ARKANSAS TO BURN A MIXTURE OF COAL CONTAINING A MINIMUM AMOUNT OF ARKANSAS-MINED COAL; TO PROHIBIT AN INCREASE IN COST TO CONSUMERS; TO REQUIRE THE REPORTING OF THE AMOUNTS AND COSTS OF ALL COAL BURNED FOR GENERATING ELECTRICITY IN ARKANSAS; AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. On and after Janury 1, 1988, to the extent that it is technically, economically and environmentally feasible, all electric utilities in Arkansas providing electric power for sale to consumers in Arkansas and generating electric power from coal-fired plants located in Arkansas shall burn a mixture of coal that contains a minimum of:

(A) three percent (3%) Arkansas-mined coal as calculated on a BTU (British Thermal Unit) basis from January 1, 1988 until December 31, 1988;

(B) six percent (6%) Arkansas-mined coal as calculated on a BTU (British Thermal Unit) basis from January 1, 1989 until December 31, 1989; and

(C) ten percent (10%) Arkansas-mined coal as calculated on a BTU (British Thermal Unit) basis each calendar year after January 1, 1990.

SECTION 2. (A) No electric utility shall be required to comply with this Act if to do so would result in increasing the cost of electricity to its consumers over the cost incurred to serve them under existing or alternative coal purchase arrangements. Types of increased costs to be considered in addition to the cost of the coal include, but are not limited to, plant modifications, additional coal handling facilities, additional environmental cost necessary to burn Arkansas coal, or any other costs or penalties which may be incurred as a result of burning Arkansas coal.

(B) No public utility shall be required to comply with this Act if to do so would result in the utility exceeding any of its State or federal [sic] air quality omission standards or any other conditions of its environmental permits.

(C) No public utility shall be required to comply with the provisions of this Act if to do so would result in the utility being unable to fulfill any existing contractual commitments for the purchase of coal or result in the purchase of a quantity of Arkansas coal above the amount the utility can utilize.

SECTION 3. It shall be the responsibility of the Arkansas Public Service Commission to enforce compliance with the requirements of this Act.

SECTION 4. All laws and parts of laws in conflict will [sic] this Act are hereby repealed.

(5)

No. 112, Original

Supreme Court, U.S.
FILED
AUG 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF THE MOTION TO DISMISS

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August, 1988
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QUESTIONS PRESENTED

1. Does a state have standing to bring an original action against another State to make a Commerce Clause challenge to a statute, where neither the Plaintiff State nor the citizens it represents as parens patriae, are engaged in the area of commerce allegedly affected.

2. Does a State have standing to make a Commerce Clause challenge to a statute when the Plaintiff State's injury is a decrease in tax revenue caused by a decrease in commerce by the industry affected by the statute?

3. May a State invoke the original jurisdiction of this Court to make a Commerce Clause challenge to another State's statute, when its domestic industry affected by the statute could

litigate the same issues in another forum?

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No. 112, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

MOTION TO DISMISS

Defendant, the State of Oklahoma, moves the Court to dismiss the Complaint pursuant to Fed. R. Civ. Pro. 12(b), as authorized by Rule 9.2 of the Rules of this Court, on the ground that the Plaintiff, State of Wyoming, has no standing to bring the cause of action alleged in its Complaint and may, therefore, not invoke the original jurisdiction of this Court. The

specific grounds for this motion are as follows:

1. The State of Wyoming's Complaint alleges no direct injury to itself as a State allegedly caused by the Oklahoma Statute in question, but simply relies on an alleged injury to its domestic coal producers which may, in turn, result in a loss of some of its tax revenue;

2. The Plaintiff State of Wyoming has alleged no direct injury which generally affects the citizens it seeks to protect as parens patriae but instead alleges an injury to a small group of its citizens or corporations (Wyoming coal producers) and may therefore not bring this actions as parens patriae of behalf of its

citizens to invoke the original jurisdiction of this Court, and;

3. The State of Wyoming has no standing to make a Commerce Clause challenge to the Oklahoma Statute when neither the State of Wyoming nor the citizens it seeks to protect are engaged in the item of commerce allegedly affected by the statute.

For all of these reasons the State of Oklahoma respectfully urges that this Motion to Dismiss be granted.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

No. 112, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

BRIEF IN SUPPORT
OF MOTION TO DISMISS

STATEMENT OF THE CASE

The State of Wyoming was granted leave to file its Complaint by this Court on June 30, 1988. The State of Wyoming is asking this Court to set aside an Oklahoma Statute which requires coal fired electric utility plants located in Oklahoma to burn a mixture of coal containing a minimum of

10% Oklahoma mined coal. Okla. Stat. tit. 45, § 939. Wyoming has alleged that this statute results in a loss of coal sales by Wyoming coal producers.

The State of Wyoming does not allege that it produces coal itself as a governmental entity and is therefore not directly injured by the Oklahoma statute. Its standing is solely based on the allegation that Wyoming coal producers will sell less coal because of the Oklahoma Statute and will therefore mine less coal. Since these producers will mine less coal the State of Wyoming will collect less of its severance tax on coal. The State of Wyoming also claims to have standing as "parens patriae" on behalf of all of its citizens because it alleges that local governments of Wyoming are the

ultimate recipients of the severance tax which goes to fund a variety of local governmental projects.

SUMMARY OF ARGUMENT

The State of Wyoming has no standing to bring this Commerce Clause challenge because it is not directly injured by Oklahoma's domestic coal statute and is not a participant in the interstate coal industry. It has no standing as parens patriae since the citizens it seeks to protect are not engaged in the coal business. Wyoming has no standing to bring this original action on behalf of a small group of its citizens (coal producers), especially when this small group has available forums to litigate the issues itself.

PROPOSITION I

THE STATE OF WYOMING HAS NO STANDING TO CHALLENGE OKLAHOMA'S DOMESTIC COAL STATUTE ON COMMERCE CLAUSE GROUNDS SINCE THE STATE OF WYOMING IS NOT A PARTICIPANT IN THE TYPE OF COMMERCE WHICH IT ALLEGES TO BE BURDENED BY THE STATUTE AND BECAUSE ITS ALLEGED INJURIES ARE SPECULATIVE AND INDIRECT AT BEST.

The State of Wyoming is asking this Court to declare an Oklahoma statute unconstitutional because it discriminates against interstate commerce. The novelty of Wyoming's Complaint is that Wyoming is not a participant in the interstate coal industry as a producer or consumer. It relies solely on the allegation that the State may lose some tax revenue if Wyoming coal producers sell less coal in Oklahoma. This alleged injury is so attenuated that it fails to meet the tests laid down by this Court to

determine standing in cases of original jurisdiction.

This Court has original jurisdiction over cases in which a State is a party. U.S. Const. Art. III, § 2. cl. 2. This Court has original and exclusive jurisdiction in suits between two or more states. 28 U.S.C. § 1251(a). For a true controversy to exist between two or more states it must be apparent that the Plaintiff State is suffering some direct injury from the action of the Defendant State. Maryland v. Louisiana, 451 U.S. 725, 735 (1981); Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976); Massachusetts v. Missouri, 308 U.S. 1, 15 (1939). As this Court stated in Maryland v. Louisiana:

> Standing to sue, however, exists for constitutional purposes if the injury alleged "fairly can be traced to the challenged act of the defendant, and not injury that results from the independent action of some third party not before the court." [citations omitted.]

451 U.S. at 736. There clearly must be a "case or controversy" that exists between two states before this Court will recognize its exclusive jurisdiction over such cases. Texas v. Florida, 306 U.S. 398, 405 (1939).

Even the State of Wyoming would have to concede that if any person or entity is directly injured or affected by the Oklahoma domestic coal statute it would be a Wyoming coal producer. It is the Wyoming coal producer that is engaged in interstate commerce. It is the Wyoming coal producer who may or may not lose some of its sales in

Oklahoma because of the statute. Of course, it is also possible that the Wyoming coal producer may lose no sales at all by selling coal to other markets. This serves to point out just how indirect and speculative the injury to the State of Wyoming really is. The State of Wyoming is not a coal producer and its severance taxes may not suffer if the coal producers mine the same amount of coal and sell as much coal as they did previously. This is certainly a possibility even in the presence of Oklahoma's domestic coal statute. In any event, Okalhoma's statute does not affect Wyoming's power to tax. If Wyoming does not act in the face of declining tax revenues its injuries would be "self-inflicted" and not

actionable. Pennsylvania v. New Jersey, 426 U.S. at 664.

Consider this hypothetical:

> An Alabama utility company has a contract to purchase one million tons of Wyoming coal for $10 million dollars. The Alabama utility company breaches its contract and refuses to purchase the coal. Would the State of Wyoming have standing to sue the Alabama utility company for breach of this contract because its tax revenues may go down if the sale is not consummated?

The answer is clearly "no" and Wyoming's claim of standing in the instant case is equally flawed. The interests that Wyoming seeks to advance in this case and the injuries it alleges are far weaker and far more indirect than those advanced by the plaintiff states in Maryland v. Louisiana. In that case several states challenged Louisiana's tax on the "first use" of natural gas imported

into Louisiana. The states that were plaintiffs in that case were substantial purchasers of natural gas and directly paid the tax they were challenging. All of the plaintiff states were participants in interstate commerce as consumers and were directly injured by the Louisiana tax.

The State of Wyoming's attempted challenge in this case is not materially different than what the State of Louisiana attempted to do in Louisiana v. Texas, 176 U.S. 1 (1900). That case arose out of a quarantine that a Texas State Health Officer placed on all goods imported from New Orleans, Louisiana. The quarantine was apparently rationalized by fear of yellow fever outbreaks. This Court first pointed out that its original

jurisdiction was only appropriate where a controversy existed between two states and not where a state was merely trying to vindicate the grievances of particular individuals. This Court did not take original jurisdiction of this matter and pointed out that states have no special position to vindicate interstate commerce claims when they are not engaged in the commerce. Id. at 19.

Wyoming's claims of injury in this case do not compare with those advanced by the States of Pennsylvania and Ohio in Pennsylvania v. West Virginia, 262 U.S. 553 (1923). In that case Pennsylvania and Ohio were challenging a West Virginia statute which would have had the effect of cutting off the supply of natural gas to those two

states from West Virginia. The plaintiff states were very dependent on this gas and were direct purchasers of this gas for its governmental buildings. This Court assumed jurisdiction in that case in large part because of this direct injury to the state.

> The attitude of the complainant states is not that of mere volunteers, attempting to vindicate the freedom of interstate commerce or to redress purely private grievances.

262 U.S. at 591. In the instant case Wyoming is a mere volunteer and is simply trying to invoke the original jurisdiction of this Court on behalf of a few of its domestic coal producers. It is attempting to bring a Commerce Clause challenge to a statute which does not injure them but which may or

may not injure its domestic coal producers.

This Court has been very hesitant to exercise exclusive jurisdiction over cases and has stated that original jurisdiction should be used sparingly. Maryland v. Louisiana, 451 U.S. at 739; Arizona v. New Mexico, 425 U.S. 794, 976 (1976). This Court has also stated that it will not take original jurisdiction absent a showing of "an absolute necessity." Alabama v. Arizona, 291 U.S. 286, 291 (1934); Louisiana v. Texas, 176 U.S. at 15. There is no "absolute necessity" for this Court to take jurisdiction of this case since a controversy, if any, would only exist between Wyoming coal producers and the State of Oklahoma.

This Court should dismiss this action since Wyoming has alleged no direct injury caused by the Oklahoma Statute in question but rather relies on its standing from an alleged injury to its domestic coal producers.

PROPOSITION II

WYOMING DOES NOT HAVE STANDING AS PARENS PATRIAE BECAUSE IT IS NOT ADVANCING CLAIMS OF GENERAL INJURY TO ITS CITIZENS BUT IS REALLY ADVANCING CLAIMS OF A FEW WYOMING COAL PRODUCERS.

Wyoming has also attempted to allege that it has standing as parens patriae in this case on behalf of its citizens. Its claim of parens patriae standing is based on their allegation that the severance tax it levies on the mining of the coal ultimately goes to local governments for local governmental projects. It alleges that lower severance taxes will injure the

local governments and therefore injure all of its citizens. This claim of parens patriae standing is just as attenuated as its allegations of standing in its governmental or proprietary capacity.

This Court has long recognized that states may invoke the original jurisdiction of this Court as parens patriae on behalf of its citizens in certain limited cases. The State may bring an action on behalf of its citizens:

> [W]here the injury alleged affects the general population of a State in a substantial way.

Maryland v. Louisiana, 451 U.S. at 737. However, this Court has held time and time again that a state may not bring an action as a "nominal party" to advance the claims of individual

citizens. Pennsylvania v. New Jersey, 426 U.S. at 665; Illinois v. Michigan, 409 U.S. 36, 37 (1972).

In Oklahoma v. Atchison, Topeka and Santa Fe Railway Co., 220 U.S. 277 (1911), the State of Oklahoma attempted to bring an action in this Court against a railroad alleging certain rate overcharges to its citizens. This Court refused to accept jurisdiction and found that the real controversy was between the railway company and certain Oklahoma citizens who shipped by rail. Since the State of Oklahoma was not shipping goods in its governmental capacity, it could not invoke the original jurisdiction of this Court.

This Court has not hesitated allowing states to sue on behalf of its citizens where the citizens of that

state are affected generally by the alleged injury. For instance, this Court held that a state could sue another state to enjoin activities in the other state which caused massive flooding in the plaintiff state. North Dakota v. Minnesota, 263 U.S. 365 (1923). A state could sue another state to prevent sewage being dumped into a river flowing into its state which had the potential to affect the health, comfort and prosperity of many of its citizens. New York v. New Jersey, 256 U.S. 296 (1921). This Court found that a state could sue certain foreign copper companies and maintain an original suit when it was alleged that the companies were discharging potentially poisonous gas flowing into its state. Georgia v.

Tennessee Copper Co., 206 U.S. 230 (1907).

Once again the allegations that serve as a basis for Wyoming's "parens patriae" standing do not measure up to the cases previously heard by this Court. Perhaps if most Wyoming citizens were coal producers themselves such an argument might be worthy of merit but the State of Wyoming is unquestionably bringing this action on behalf of a few of its coal producers. It alleges a speculative injury which may or may not trickle down to local governments which may or may not injure the citizens of Wyoming. These allegations do not satisfy the requirements for parens patriae standing and the Complaint should be dismissed.

PROPOSITION III

THIS COURT SHOULD DISMISS THE COMPLAINT AND REFUSE TO TAKE ORIGINAL JURISDICTION OF THIS MATTER SINCE THE ISSUES RAISED BY WYOMING'S COMPLAINT MAY BE LITIGATED BY THE REAL PARTIES IN INTEREST IN ANOTHER FORUM.

In deciding whether past cases were appropriate for its original jurisdiction this Court has considered "the availability of another forum" for the claims to be litigated in reaching its decision. Maryland v. Louisiana, 451 U.S. at 740. This Court has looked to see whether the named parties before them have alternative forums but has also looked at whether the issues could be litigated by other parties as well. Arizona v. New Mexico, 425 U.S. at 797. Arizona v. New Mexico is a case worthy of note in the instant case. In this case the State of Arizona attempted to

sue the State of New Mexico to challenge a New Mexico tax on electrical power generated in New Mexico. Because of tax credits the tax was only levied on utility companies generating their power in New Mexico but selling the power out of state. Coincidentally three Arizona utility companies had generating facilities in New Mexico which sold power in Arizona. Before Arizona attempted to institute the original action the three Arizona utility companies brought an action in State District Court in New Mexico raising the identical constitutional challenges that the state was urging before the Supreme Court. Even though the State of Arizona was not a party to the state case and was alleging in its

original action that the New Mexico tax directly raised its cost of electricity as well as its citizens, this Court refused to take jurisdiction. As stated previously this case is extremely relevant to the instant case since the Court refused to take jurisdiction, in part, because the issues were being litigated by the parties directly affected in another forum. This Court also pointed out that it was the Arizona utility companies that were being assessed the tax and could pursue their own challenges.

This Court made similar observations in Alabama v. Arizona. In that case the State of Alabama sued 19 states that had passed statutes banning or regulating the sales of products

made with convict labor. The State of Alabama had substantial operations in which it produced goods in its penitentiaries using convict labor. The State of Alabama did not market the products itself but had a contract with a private company located in Alabama. It was the company that marketed the products to the several states in interstate commerce. One of the reasons cited by this Court for refusing to take jurisdiction was the fact that the company holding the contract with the State of Alabama could litigate these issues in the various state courts in which it had a contract. If Oklahoma's domestic coal statute is to be challenged it should be challenged by those individuals directly affected by the statute, if

indeed they are affected at all. There is nothing to prevent a Wyoming coal producer or perhaps the association of coal producers that filed an amicus brief previously in this case, from instituting an action in the district courts of the State of Oklahoma to challenge the constitutionality of Oklahoma's domestic coal statute. This is, in fact, the most usual way for Commerce Clause cases to be litigated. See e.g. Hunt v. Washington State Apple Commission, 432 U.S. 333 (1977). The State of Wyoming's Complaint should be dismissed.

CONCLUSION

The State of Wyoming lacks standing to institute this action since it is not engaged in the sale of coal and is therefore not directly injured by

Oklahoma's domestic coal statute. It lacks standing as parens patriae because there has been no allegation that Oklahoma's domestic coal statute somehow injures the general citizenry of the State of Wyoming and in reality the Complaint is simply brought on behalf of a few domestic Wyoming coal producers. These coal producers, as the real parties in interest, should litigate their claims and prove their injuries, if they exist, in another forum. This case is inappropriate for the original jurisdiction of this Court and the Complaint of the State of Wyoming should be dismissed.

Respectfully submitted,

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No. 112, Original

In The Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

RESPONSE TO MOTION TO DISMISS

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No. 112, Original

In The Supreme Court

Of The United States

October Term, 1987

STATE OF WYOMING,
Plaintiff,
vs.
STATE OF OKLAHOMA,
Defendant.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

On June 30, 1988, the Court accepted the complaint filed by the State of Wyoming in this matter and allowed the defendant State of Oklahoma sixty days within which to file an answer. In its complaint and accompanying brief Wyoming offered two bases to support original jurisdiction: 1) that Wyoming had experienced a decline in coal severance tax collections because of Oklahoma legislation which mandates the use of Oklahoma produced coal and 2) that citizens of Wyoming had also suffered substantial economic injury due to the operation of the Oklahoma law.

On August 30, 1988, the State of Oklahoma filed a Motion to Dismiss and Brief in Support of the Motion of Dismiss, in lieu of filing an answer. The thrust of Oklahoma's motion is that Wyoming has no standing because it has not been injured by Oklahoma legislation which requires that at least ten percent of coal burned in Oklahoma utilities be mined in Oklahoma, OKLA. STAT. tit

45, §939 (Supp. 1986), (the Act) that Wyoming cannot proceed in *parens patriae*, and that the case should properly be heard in another forum.

This case is an appropriate action in which the Court should exercise its original jurisdiction, because the State of Oklahoma in enacting economic protectionist legislation has inflicted a substantial and serious injury on the State of Wyoming and its citizens. This case is the kind of suit which exemplifies the reason for permitting the Supreme Court to resolve controversies between states; the essence of federalism is implicated in this case. Additionally, the State of Wyoming has no other forum in which to challenge legislation which unreasonably burdens interstate commerce. For these reasons Wyoming requests this Court to deny Oklahoma's motion to dismiss.

ARGUMENT

I. THIS COURT HAS ALREADY DETERMINED THAT OKLAHOMA'S ARGUMENTS ARE WITHOUT MERIT.

The arguments raised by Oklahoma have already been exhaustively discussed in its Brief in Opposition to Motion for Leave to File Complaint. Those arguments were obviously rejected on June 30, 1988 when the Court granted Wyoming leave to file its complaint.

In filing its motion to dismiss, the State of Oklahoma will only prolong resolution of a matter of great importance to the State of Wyoming. To allow Oklahoma to delay the proceedings is inappropriate and does not reflect the view that the object of original cases is to have the parties reach and argue the merits of the controversy as soon as possible. *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). This

Court should summarily dismiss Oklahoma's motion, because "procedures governing the exercise of our original jurisdiction are not invariably governed by current rules of civil procedure." *Id.* at 644.

In its Motion for Leave to File a Complaint and accompanying brief, Wyoming detailed its justification for requesting that the Court decide this case. (See Brief, pp. 18-24). Therefore, this response will supplement the arguments already presented, rather than repeating them.

II. THE COURT PROPERLY ACCEPTED JURISDICTION OF THIS CASE BECAUSE WYOMING HAS SUFFERED A SERIOUS AND SUBSTANTIAL INJURY DIRECTLY CAUSED BY THE OKLAHOMA LEGISLATION.

Oklahoma argues that Wyoming has no standing because it has not been directly injured by the Oklahoma legislation. However, an examination of the facts set forth in the complaint and the decisions upon which Oklahoma relies will demonstrate that Oklahoma's argument must fail.

To obtain original jurisdiction in this Court, as provided for in article III, §2, cl. 2 of the United States Constitution, the complaining state must have "suffered a wrong through the action of the other State, furnishing ground for judicial redress." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). The injury must be traced to the defendant's action, rather than the independent action of a third party. *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981). Those tests are met here.

The instant case is similar to cases in which the Court accepted original jurisdiction. There is a direct issue between states. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). The States of Wyoming and Oklahoma are

undeniable adversaries because of the Oklahoma Act. *California v. Texas*, 457 U.S. 164 (1982). The validity of a state statute is being challenged. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

In many ways the issue presented in this case is not unlike that presented in *Maryland v. Louisiana*, 451 U.S. 725 (1981), in which this Court granted jurisdiction. In that case, the question was raised whether a "First Use" tax imposed upon the consumers of natural gas processed in Louisiana violated the commerce and supremacy clauses of the Constitution. Because Maryland was found to be directly affected by the tax, the Court found that it had been injured and had standing to bring the action. In the instant case, the commerce clause is also implicated because Oklahoma's protectionist legislation has caused direct injury to Wyoming. The State of Wyoming is not a nominal party in this conflict; it has received less severance tax monies because the Act has resulted in less coal being sold to Oklahoma utilities.

The complaint filed by Wyoming alleges that Oklahoma utilities purchased over ten million tons of Wyoming coal in 1986. The complaint also alleges that Wyoming derives significant severance tax revenues from the sale of Wyoming coal to Oklahoma coal-fired plants, and that Wyoming producers sell a large portion of Wyoming coal in interstate commerce. The State of Wyoming's supporting brief makes it clear that severance tax receipts are disbursed through a statutorily mandated procedure. These tax revenues are disbursed to the general fund to run state government, to the water development fund, to the highway fund and to counties and municipalities.

It is difficult to understand the State of Oklahoma's assertion, unsupported by any factual statements, that

Wyoming is not injured by the Act. The State of Oklahoma argues that the State of Wyoming's injury is attenuated because Wyoming is not a producer or a consumer of coal. Oklahoma further suggests that Wyoming producers could easily sell their coal to other users. These arguments are not true and are without merit.[1]

The State of Wyoming's injury can "fairly be traced to the defendant." *Maryland v. Louisiana*, 451 U.S at 736. The diminution of Wyoming's tax revenues results from the action of the State of Oklahoma. Indeed, it is difficult to think of a more direct injury to a state than a reduction in its tax revenues.

The Defendant relies on a variety of decisions other than *Maryland v. Louisiana, supra*, in its attempt to support its motion; however, virtually all of the cases cited differ from the instant case.

This matter does not involve private litigants and it does not present the Court with a recurring controversy and state concerns, as found in *Illinois v. Michigan*, 409 U.S. 36 (1972). Rather, the instant case involves a controversy between two states with federalism concerns. It does not involve a matter in which the State of Wyoming has inflicted some harm on itself, as in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), nor does it involve a valid state

---

[1] There has been a significant decline in the production of coal in Wyoming since the enactment of the Oklahoma Act. (See Affidavit of Randolph Wood, director of Department of Environmental Quality, State of Wyoming, Appendix, A-1).

An oversupply of coal created by loss of sales means that Wyoming producers must sell their coal, if at all, at significantly lower prices than provided for in original contracts. If there are fewer coal sales at a lower price, obviously, less severance tax will be collected by the State of Wyoming. (See Affidavit Seth Schwartz, Appendix A-5.)

statute which is not properly administered, as was the situation in *Louisiana v. Texas*, 176 U.S 1 (1900). Real harm has been done to Wyoming by the operation of the Oklahoma statute, unlike *Arizona v. Alabama*, 291 U.S. 286 (1934), in which there was no showing that a statute which forbade the import of convict-manufactured goods actually affected the complaining states. In *Arizona v. New Mexico*, 425 U.S. 794 (1976), this Court refused to hear a complaint filed by Arizona because it determined that the New Mexico statute would only affect Arizona residents. However, in the instant case the Oklahoma statute, especially if its protectionist approach is followed by other mineral producing states weakened by hard econonic times, has a great potential to affect other states as well. The subject matter is not trivial, as opposed to *California v. West Virginia*, 454 U.S. 1027 (1981).

The State of Wyoming recognizes that this Court has on several occasions observed that original jurisdiction should be sparingly granted, so that the Court can devote its energies to appellate work. *Washington v. General Motors Corp.*, 406 U.S. 109, 113 (1972). However, this case presents the kind of suit which should be heard by the Court.

III. THE STATE OF WYOMING HAS STANDING TO CHALLENGE THE OKLAHOMA ACT AS *PARENS PATRIAE* OF ITS CITIZENS.

In addition to pleading that it had been substantially injured by the Oklahoma Act, the State also pleaded that it had standing as *parens patriae* to bring the action on behalf of its citizens.

This Court has often recognized that a state may act as representative of its citizens in original actions where the

alleged injury affects the general population of a state in a substantial manner. *Maryland v. Louisiana*, 451 U.S. at 739. All of the citizens of Wyoming have been affected by the reduction in severance tax payments, which is directly attributable to the Act. These monies are used to finance the construction of highway and water development projects; they are deposited in the state's general fund, to be used for the operation of government; they may be used to fund Worker's Compensation; they are used for governmental construction of public works. All of these uses affect the general population of the State in a substantial manner.

Wyoming should be allowed to bring this action as *parens patriae* because the Oklahoma Act "limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister states." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 451, *reh'g denied* 324 U.S. 890 (1945). Wyoming is appropriately representing her citizens as *parens patriae* in order to prevent further harm to its quasi-sovereign interests. *Hawaii v. Standard Oil*, 405 U.S. 251, 257-258 (1972).

IV. THERE IS NO OTHER FORUM IN WHICH THE STATE OF WYOMING COULD LITIGATE THIS CASE.

28 USC §1251(a), provides that "the Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." Consequently, the State of Wyoming has no other forum in which to resolve this issue.

Oklahoma argues that a challenge to the Oklahoma Act could be brought by affected coal producers in a state court proceeding. However, such an argument fails to

recognize that the interests of the State of Wyoming are dissimilar from and conflict with those of coal producers which must pay coal severance taxes to the state. The focus and emphasis of a state and its taxpayers are not identical. Coal producers doing business in Oklahoma could, for a variety of reasons, including fear of political reprisal, choose not to challenge the Act. Nowhere in its motion or brief does Oklahoma allude to any pending court challenges to the Act.

This Court does not automatically consign a request for original jurisdiction to oblivion because a state action could be filed or is pending. In *Maryland v. Louisiana*, the Court granted jurisdiction, even though state court actions were pending, and observed that whether original jurisdiction should be exercised when identical issues are raised in a pending suit in another forum is a proposition that must be determined on a case by case basis. 451 U.S. at 743.

If a pending state court proceeding could completely address Wyoming's concerns, then it might be appropriate for the Court to refuse to hear this case. *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Massachusetts v. Missouri*, 308 U.S. 1, 19-20 (1939). In this case where no other action is pending, and where any action which might be brought by coal producers would not necessarily represent the interests of the State of Wyoming, original jurisdiction should be retained.

CONCLUSION

The Court should decide this case on its merits. In *California v. Texas*, 457 U.S. 164, 168 (1982), the Court observed that for a case to be worthy of original jurisdiction, one must consider the seriousness and dignity of the claim, and the availability of another forum with jurisdic-

tion over the parties where issues may be litigated and where appropriate relief may be had.

All of the tests set forth in *California v. Texas* are satisfied. The question of whether one state is unduly burdening interstate commerce is a serious and dignified matter. The State of Wyoming has nowhere else to litigate this matter. Relief in the form of invalidating the Act is available.

The State of Wyoming has been affected in a real and substantial manner because of the enactment and operation of the Oklahoma Act. The State of Oklahoma should not be permitted to dispose of this important matter on procedural grounds.

The motion to dismiss filed by the State of Oklahoma should be denied, and the case decided on its merits in a summary manner.

Respectfully submitted,

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No. 112, Original

In The Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

AFFIDAVIT OF SETH SCHWARTZ

I, Seth Ira Schwartz, being first duly sworn, state as follows:

1. I am a principal of the consulting firm named Energy Ventures Analysis, Inc. (EVA), which is located at 1901 North Moore Street, Suite 1200, Arlington, Virginia 22209. I graduated from Princeton University in 1977 with a BSE in Geological Engineering, and have been a principal in EVA since its inception in 1981.

2. The largest portion of EVA's work is the economic analysis of the coal industry for a variety of clients, including coal companies, electric utilities, state and federal agencies, railroads, and others with direct or indirect interests in the coal industry. Typical EVA projects in analyzing the coal industry include long-term forecasts of coal demand by market and customer, long-term studies of regional coal supply and prices, coal market analyses in support of mine development or acquisitions, production

cost analyses of individual mines and of coal supply regions, strategic planning for coal companies and electric utilities, and the review of electric utility coal procurement practices. EVA also provides expert testimony in a number of state and federal court cases as well as arbitration concerning coal-related issues such as coal contract interpretation, coal market prices, and damages associated with these areas. I have personally been involved in either an analytical or management role in most of EVA's projects in these areas.

3. My work analyzing the coal industry and coal markets has been national in scope, and includes a number of projects related to the market for Wyoming coal. Within the last year, I have performed supply and demand studies for Powder River Basin coal for two utility customers, and one similar market study for a producer of this coal. I have also performed recent studies of the market for south Wyoming coal for two producers and a railroad. Either I or one of my partners have testified as experts in five separate court cases regarding litigation over Wyoming coal contracts.

4. Like much of the coal industry, Wyoming coal producers have large excess production capacity. This is due to the construction of many new mines in the 1970's in response to forecasts of high demand growth, and the subsequent actual growth being less than forecast. Producers in the Wyoming portion of the Powder River Basin (where the coal currently shipped to Oklahoma is mined) have existing annual production capacity of 186.4 million tons versus actual 1987 coal production of only 127.1 million tons. The planned annual production capacity at these 17 mines is about 282 million tons. The South Wyoming mines have an even higher percentage of excess capacity.

5. As a result of this excess capacity, the Wyoming coal producers are aggressively selling their product to any and all potential customers. The loss of any market cannot be replaced by other coal sales because the Wyoming producers are selling this coal anyway. In my opinion, the loss of sales of Wyoming coal to Oklahoma customers cannot be replaced by sales to other markets.

FURTHER AFFIANT SAITH NAUGHT.

/s/ *Seth Schwartz*

STATE OF VIRGINIA)
) ss.
COUNTY OF ARLINGTON)

The foregoing instrument was subscribed and sworn to before me this 27th day of September, 1988, by Seth Schwartz.

/s/ *Donna Wilson*
Notary Public

My commission expires: June 11, 1991

No. 112, Original

In The Supreme Court

Of The United States

October Term, 1987

STATE OF WYOMING,

Plaintiff

vs.

STATE OF OKLAHOMA,

Defendant

AFFIDAVIT OF RANDOLPH WOOD

I, Randolph Wood, being first duly sworn, state as follows:

1. I am the Director of the Wyoming Department of Environmental Quality. In that capacity I oversee programs for permitting coal mines. Under my direction the Air Quality Division and the Land Quality Division maintain statistics on the permitted capacity of coal mines in Wyoming, with particular emphasis on the mines in the Powder River Basin.

2. As of 1987, there was over 318,000,000 tons per year of permitted capacity in coal mines in the Powder River Basin in Wyoming. By contrast, total production from all Wyoming coal mines in 1987 was 146,500,000. It is clear that significant surplus capacity exists in Wyoming's coal mining industry.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Randolph Wood

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

The foregoing instrument was subscribed and sworn to before me this 27th day of September, 1988, by Randolph Wood.

/s/ James S. Uzzell
Notary Public

My Commission expires: June 23, 1991

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 112, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

ANSWER OF THE STATE OF OKLAHOMA

ROBERT H. HENRY
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November, 1988
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8

No. 112, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

ANSWER

The Defendant State of Oklahoma by and through its attorney, Robert H. Henry, Attorney General of Oklahoma, answers the allegations of the Plaintiff's Complaint as follows:

1. The Defendant specifically denies each and every material allegation of the Plaintiff's Complaint except as specifically admitted hereafter.

2. The Defendant admits the allegations contained in paragraphs I and II of the Plaintiff's Complaint.

3. The Defendant admits that Plaintiffs are seeking relief by asking this Court to exercise its original jurisdiction over controversies under Article III, § 2, cl. 2, of the Constitution of the United States as referred to in paragraph III of the Plaintiff's Complaint. The Defendant denies that this case is appropriate for the exercise of the original jurisdiction of the United States Supreme Court.

4. As to the allegations in paragraph IV of Plaintiff's Complaint, the Defendant admits that Wyoming-based coal producers provide a significant percentage of the coal produced in the

United States which is shipped by rail. The State of Wyoming is not a producer of coal. While the Defendant does not have sufficient information to admit that a specific number of tons was purchased by Oklahoma utilities in 1986, the Defendant admits that Oklahoma utilities purchased several million tons.

5. As to the allegations contained in paragraph V of the Plaintiff's Complaint, the Defendant admits that Wyoming imposes a severance tax on the extraction of coal within its borders and that Wyoming based producers sell their coal in interstate commerce. The Defendant denies that Wyoming's severance tax is assessed on the sale of coal.

6. As to the allegations contained in paragraph VI of the Plaintiff's Complaint, the Defendant admits that the Plaintiff derives significant revenue from its severance tax. The Defendant denies the tax is imposed on the sale of coal. The Defendant denies that Oklahoma utilities pay Wyoming's severance tax. The tax is levied on the extraction of coal which is paid by coal producers.

7. As to the allegations contained in paragraph VII of the Plaintiff's Complaint, the Defendant admits that § 939 of Title 45 of the Oklahoma Statutes generally requires Oklahoma utilities to obtain up to 10% of their coal requirements from coal mined in Oklahoma, however, the Defendant submits that several conditions must be

met before such a percentage is absolutely required.

8. As to the allegations contained in paragraphs VIII and IX of Plaintiff's Complaint, the Defendant has insufficient facts with which to determine the truth or falsity of most of these allegations and, therefore, denies same. The Defendant specifically denies that the purpose of §§ 939 and 939.1 of Title 45 of the Oklahoma Statutes is to promote economic development in Oklahoma. The Defendant also denies that these statutes are responsible for any alleged injury to the local governments of Wyoming as the Plaintiff itself has designed the severance tax structure to fund local projects. The Defendant denies that the Plaintiff has

standing as "parens patriae" since the local governments of Wyoming are not engaged in the commerce alleged to be affected.

9. The Defendant denies the allegations of paragraphs X, and XI of the Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

In addition to fully answering the allegations of Plaintiff's Complaint, the Defendant would further assert the following affirmative defense. The Plaintiff State of Wyoming has no legal standing to challenge the constitutionality of §§ 939 and 939.1 of Title 45 of the Oklahoma Statutes on Commerce Clause grounds as the State of Wyoming is not directly injured by the Oklahoma statute, is not a participant in the commerce allegedly affected as a

producer or consumer of coal nor are the citizens or local governments it is allegedly protecting as parens patriae. This Court, therefore, lacks subject matter jurisdiction over the State of Wyoming's claims.

WHEREFORE, the Defendant having fully answered, requests that this Court:

a. Deny any affirmative relief requested by the Plaintiff;

b. dismiss the Plaintiff's Complaint;

c. grant the Defendant any other appropriate relief to which it they may be entitled and which this Court may deem just and equitable.

DATED this 30th day of November, 1988.

STATE OF OKLAHOMA.

Respectfully submitted,

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No. 112 ORIGINAL

(15)

FILED
DEC 28 1989
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

REPLY BRIEF TO WYOMING'S RESPONSE TO THE STATE OF OKLAHOMA'S MOTION FOR SUMMARY JUDGMENT

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December, 1989
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21pp

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BEFORE THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

STATE OF WYOMING,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 112, Original
	)	
STATE OF OKLAHOMA,	)	
	)	
Defendant.	)	

OKLAHOMA'S BRIEF IN REPLY TO THE RESPONSE OF THE STATE OF WYOMING TO OKLAHOMA'S MOTION FOR SUMMARY JUDGMENT No. 112, Original

INTRODUCTION

In its response to the State of Oklahoma's Motion for Summary Judgment, the State of Wyoming has not responded to many of the main issues raised by the State of Oklahoma. It has also chosen not to dispute any of the material facts alleged to be undisputed by the State of Oklahoma in its Motion and Supporting Brief. The following propositions will be in reply to Wyoming's Response brief, and the portions of Wyoming's brief will be appropriately identified after the proposition headings.

PROPOSITION I

THE STATE OF WYOMING HAS NO STANDING TO BRING THIS ACTION AND THE FACT THAT IT WAS ALLOWED TO FILE THE COMPLAINT IS NOT DISPOSITIVE OF THE STANDING ISSUE.

(Reply to VI of Wyoming's Response Brief)

In response to Oklahoma's standing arguments, Wyoming implies that this issue has been decided since it was allowed to file its

Complaint and proceed with its suit. Oklahoma submits that the undisputed facts show Wyoming has no standing and that the issue of standing has not been finally settled.

The State of Wyoming was granted leave to file the Complaint in the instant case by the U.S. Supreme Court. The decision of the U.S. Supreme Court was not based on the undisputed facts which have been developed through discovery or the stipulation of facts entered into by the parties. The decision was based on the allegations set out by the State of Wyoming. The fact that Wyoming has been allowed to proceed in this lawsuit has no bearing on whether the undisputed facts now demonstrate whether or not an actual case or controversy exists between the State of Oklahoma and the State of Wyoming. In point of fact, the U.S. Supreme Court has recognized that simply because it has allowed a State to file a complaint against a sister State , it is not foreclosed from finding that no case or controversy exists.

In Texas v. Florida, 306 U.S. 398 (1939), the Supreme Court granted the State of Texas' motion to file a complaint against the State of Florida in 1937. A special master was appointed and the case proceeded. The Supreme Court did not decide the case until 1939 and clarified that its previous granting of the Motion to file the Complaint was not dispositive of the issue of whether or not the case was a proper one for the Court's original jurisdiction:

> While the exceptions do not challenge the jurisdiction of the Court, the novel character of the questions presented and the duty which rests upon this Court to see to it that the exercise of its powers be confined within the limits prescribed by the Constitution make it

> incumbent upon us to inquire of our own Motion whether the case is one within its jurisdiction. [Citation omitted]

306 U.S. at 405. The Special Master clearly has authority to recommend to the Supreme Court that Wyoming's case be dismissed for lack of standing.

As expected, the State of Wyoming has found no case which has recognized that a State has standing on the basis of some alleged, derivative loss of tax revenues from an injury to its taxpayers. As stated in Oklahoma's Brief in Support of its Motion for Summary Judgment, the two Circuit Courts of Appeal which have addressed this question have both found that States have no standing on this theory. The two Federal District courts in the cases cited by the State of Oklahoma in this same brief also found no state standing based on similar theories. The State of Wyoming hasn't even attempted to distinguish these cases. The State of Oklahoma would submit that the Special Master should follow the reasoning of these cases and recommend to the Supreme Court that it dismiss this case.

As the State of Oklahoma pointed out in its Brief In Chief, and as the State of Wyoming stipulated, Wyoming itself chose to lower its severance tax rate from 10.5% to 8.5% effective for the 1987 production years. In its Response Brief, the State of Wyoming makes the startling assertion that since 2% of its previous 10.5% tax automatically expired in 1986, that somehow this was not a voluntary decision on the part of the State of Wyoming to do with less tax revenue. The Special Master can take judicial notice of the fact that the Wyoming Legislature is an integral part of the

State of Wyoming and sets the policy for that State. If the alleged loss of severance tax revenues was so important to the State of Wyoming to take this case to the United States Supreme Court, why would the Wyoming Legislature simply not extend the tax or make it permanent?

The State of Oklahoma takes strong exception to the State of Wyoming trying to justify expanding its theories of the case in a Motion For Summary Judgment. As Oklahoma stated in its Brief In Chief, the State of Wyoming did not plead, or otherwise disclose, that it would also be attempting to allege injury to the ad valorem tax collections of its local governments and alleged lost coal royalties on Federal land. Obviously, had the State of Oklahoma been aware of these expanded theories of standing, it would have had the opportunity to submit discovery requests to the State of Wyoming on any <u>actual</u> damages in these areas. It would be extremely unfair to the State of Oklahoma to allow the State of Wyoming to expand the issues after the discovery cutoff in this case. The Special Master should note that none of these topics was covered in the Stipulation of Facts entered into by the parties and filed with the Special Master.

To support its position that it can expand the issues, the State of Wyoming cites irrelevant authority in support thereof. The State of Oklahoma agrees that the pleadings do not control a decision on Motion for Summary Judgment and that the Court must look at the facts in the case. This means that parties cannot rely on the pleadings alone to establish their case and must establish

their case by the facts as developed. This is not authority to allow a party to present facts and expand the issues in the pleadings upon a Motion for Summary Judgment.

Pursuant to Fed. Rul. Civ. P. 8, the allegations of the Complaint must give ". . .fair notice to the party against whom relief is sought." Reed v. Board of Education of Parkway School District, 460 F.2d 824, 826 (8th Cir. 1972). The allegations only give such "fair notice" if the allegations allow the defendant to adequately prepare a responsive pleading and prepare for trial. Riblet Tramway Company v. Monte Verde Corporation, 453 F.2d 313 (10th Cir. 1972). It is also well-settled that complex cases and cases where the constitutionality of a statute is involved, require more specific factual statements in the Complaint. 2A Moore's Federal Practice par. 8.13 at 8-78,79 (2d ed. 1989); see, Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383 (10th Cir. 1980). A party cannot raise a totally new legal issue on Summary Judgment that wasn't raised in the Complaint. Agustin v. Quern, 611 F.2d 206, 209 (7th Cir. 1979).

The alleged harm to local government ad valorem tax receipts and the alleged harm from royalties received from Federal Government land are far removed from Wyoming's original allegations of some alleged loss of severance tax revenues. There has been no notice in the Complaint of these alleged injuries. The State of Oklahoma would again assert that the Supreme Court has allowed Wyoming to file a Complaint where these issues were not raised and, if it now wants to raise them, it should get permission from the

Court to file a new Complaint and allow the State of Oklahoma to conduct additional discovery on these issues before deciding a case on Motion for Summary Judgment.

The State of Oklahoma would submit that the Special Master review this case based on the State of Wyoming's original theories of the case and recommend to the Supreme Court to dismiss this case for lack of standing.

PROPOSITION II

THE STATE OF WYOMING HAS ADMITTED THAT THE GRAND RIVER DAM AUTHORITY IS AN AGENCY OF THE STATE OF OKLAHOMA, AND ITS COMMERCE CLAUSE CHALLENGE IS INEFFECTIVE AGAINST THE STATUTE AS APPLIED TO THE GRDA BECAUSE THE STATE OF OKLAHOMA IS ACTING AS A MARKET PARTICIPANT.

(IN REPLY TO IV OF WYOMING'S RESPONSE BRIEF)

The State of Wyoming has admitted that the Grand River Dam Authority (GRDA) is an agency of the State of Oklahoma. Through the GRDA, the State of Oklahoma purchases coal. The GRDA is one of the utilities covered by the Act attacked by the State of Wyoming. Without citing any relevant authority, the State of Wyoming states that Oklahoma cannot defend its Act, as applied to purchases made by the GRDA, under the well-recognized "market participant" exception to commerce clause challenges. Wyoming argues that the State of Oklahoma cannot defend its statute as applied to GRDA purchases because the statute doesn't apply solely to GRDA coal purchases. The State of Wyoming cites no case which stands for the principle that the market participant exception is

only applicable where a state passes a special statute for its purchases.

As stated in Oklahoma's Brief In Chief, it is well settled that States may purchase goods and services from whomever they choose when acting as a market participant. Reeves, Inc. v. Stake, 447 U.S. 429 (1980). The only case cited by the State of Wyoming is South-Central Timber Development v. Wunnicke, 467 U.S. 82 (1984), which actually supports the State of Oklahoma's position. That case dealt with the State of Alaska when it was selling its own timber from State lands. The State solicited bids for prospective purchasers and in order to win the bid a buyer had to agree that the lumber taken from State land would have to b "partially processed" within the State borders before exportation. In other words, the State of Alaska was attempting to restrict downstream markets with this contract provision. Alaska attempted to defend its actions under a market participant theory citing Reeves and Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), which dealt with a Maryland statute. The Supreme Court reaffirmed its position in the market participant cases but pointed out that the actions of the State of Alaska didn't fit the exception:

> However, when Maryland became involved in the scrap market it was as a purchaser of scrap; Alaska, on the other hand, participates in the timber market, but imposes conditions downstream in the timber-processing market.

467 U.S. at 95. In the instant case, the State of Oklahoma is acting as a purchaser of a product: coal. Its actions as a purchaser and market participant fall directly within the well-

recognized market participant exception discussed in Oklahoma's Brief in Chief. The South-Central Timber case has nothing to do with the instant case since the State of Oklahoma is not attempting to affect "downstream commerce".

PROPOSITION III

OKLAHOMA'S ACT CANNOT BE STRUCK DOWN WITHOUT HEARING SOME EVIDENCE ABOUT THE LEGITIMATE LOCAL PURPOSES BEHIND THE STATUTE, AND THE STATE OF OKLAHOMA HAS ADVANCED COMPELLING LOCAL INTERESTS TO DEFEND ITS STATUTE.

(Reply to I and II of Wyoming's Response Brief)

Wyoming states that the Special Master should strike down the Oklahoma statute which it challenges on its face without any factual inquiry. This clearly would be contrary to applicable case law. The cases cited by both Wyoming and Oklahoma state that statutes which arguably discriminate against goods coming from outside the State's borders can still be upheld if the State demonstrates a legitimate local purpose in defense of the statute.

In Maine v. Taylor, 477 U.S. 131 (1986), the Supreme Court dealt with a State statute which completely banned the importation of live bait fish from outside its borders. In that case, the State was allowed to introduce evidence at an evidentiary hearing to show the environmental concerns of the State because of the presence of parasites on imported bait fish. Similarly in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), extensive evidentiary hearings were held in the District Court in allowing the State to show the legitimate purposes for the banning

of plastic milk containers. If the Special Master and the U.S. Supreme Court were to strike down the Oklahoma statute without hearing evidence, how could the State of Oklahoma ever demonstrate that the Act serves legitimate local purposes? If the Special Master does not recommend the dismissal of this case for lack of standing, the State of Oklahoma submits that he should conduct evidentiary hearings so that the State of Oklahoma can demonstrate its legitimate local purposes for the Act.

Contrary to what the State of Wyoming says in its Response Brief, the State of Oklahoma is advancing legitimate, if not compelling, local purposes in defense of its statutes. Oklahoma's Brief in Chief thoroughly goes over these legitimate local purposes. Oklahoma has pointed out that by insisting on broader markets for coal, the long-term price of coal will be more competitive. Multiple markets for a commodity will lead to competitive prices, and this is a relatively basic economic principle with which Wyoming certainly cannot disagree.

Oklahoma's act also prevents the State from becoming solely reliant on a fuel supply far removed from the State of Oklahoma. Certainly the State of Oklahoma does not have to wait for a coal strike or a rail strike before anticipating this obvious potential problem and insisting on the development of local coal supplies. While not clearly stated in Oklahoma's Brief in Chief, the State of Oklahoma would submit that because it is necessary to have a nearby coal supply for its utilities, there is not really any other

"available non-discriminatory means" to serve this legitimate local purpose. Maine v. Taylor, 477 U.S. at 138.

The third legitimate local purpose is to develop a coal source which doesn't have to be shipped hundreds of miles by one railroad company. Wyoming has either admitted or failed to controvert the fact that, at the time the Act went into effect, Burlington Northern Railroad was the only railroad shipping coal out of the Powder River basin in Wyoming and destined for Oklahoma. The State of Wyoming also failed to controvert the fact that between 50 and 75% of the delivered price of coal in the last several years has been for rail transportation and not for the coal itself. The State of Oklahoma would submit that relying on one railroad results in an inherent lack of competition and justifies the passage of the Act.

The State of Wyoming has tried to mischaracterize Oklahoma's argument by its statements relating to the regulation of railroad rates. The State of Oklahoma has never attempted to regulate rail rates nor has it ever argued that this statute helps to regulate rail rates. The Act makes it possible to rely less on rail transportation so that Oklahoma utilities won't have to pay outrageously high rates.

The State of Wyoming also attempts to argue that the Act is not a part of Oklahoma's regulation of electrical utility rates. To accept this argument the State of Wyoming would have the Special Master believe that the number of coal markets has no impact on the price of coal. It would then have the Special Master believe that

the price of coal has no impact on utility rates. It should be obvious that the coal supply for Oklahoma's four electric utilities with coal-fired generating plants is an integral part of the price of generating the electricity and the rates charged to consumers to recoup these costs of generation.

The State of Oklahoma takes strong exception to the affidavit and report of Linda Rathbun submitted by Wyoming. Neither Ms. Rathbun nor the State of Wyoming has apparently re-read the very Act that they are attacking. The State of Wyoming has incorrectly stated in many places in its brief, that Oklahoma's utilities can pass on any potential price increases as a result of the Act to ratepayers. The Act states, ". . .The cost to the entity shall not increase the cost to the consumer. . ." 45 Okla.Stat., § 939.1 (1989 Supp.). The statute itself specifically forbids the ratepayer from paying higher rates, and the only court to construe the statute has so found.

In Northeast Oklahoma Electric Cooperative, Inc., et. al v. The Grand River Dam Authority, et. al., Case No. C-88-127 (Dist. Ct. Craig County, Okla.), a utility consumer attempted to challenge the Act challenged by Wyoming in this case. The Oklahoma Attorney General intervened in the case and filed a Motion to Dismiss for lack of standing. In granting the Motion to Dismiss, the State District Judge construed the Act as follows:

> 4. A reading of the provisions set forth above clearly demonstrates that any increased cost to the utility, brought about by burning a minimum of 10% Oklahoma mined coal, is not to increase the cost to the utility consumer. In point of fact, the language of the statute specifically prohibits such increase in cost.

> Accordingly, the statute, by its own terms, has no direct effect upon utility consumers, such as Plaintiffs herein. As the statute by its very terms does not affect consumer rights, consumers lack standing to challenge the statute's constitutionality.

(See "Journal Entry of Judgment" dated September 2, 1988, in accompanying Appendix). The Act forbids the ratepayer from paying any additional cost even assuming that utilities paid more for Oklahoma coal. It should be pointed out that there is nothing in the record that, on the average, Oklahoma coal is higher in price than Wyoming coal. As Ms. Rathbun bases her entire Affidavit on the faulty assumption that increases in price, if any, can be passed on to the consumer, her entire affidavit may be disregarded.

The State of Oklahoma would also point out that the affidavit of Ms. Rathbun is based on facts which are inconsistent with the facts as stipulated by the State of Wyoming. In at least one instance her report appears to be biased. A few examples of these inaccuracies and bias are instructive.

In her report entitled "Estimate of the Costs to the Oklahoma Ratepayer of Oklahoma's 'Buy-local Coal' Law", she implies in part II entitled "Conclusions" that the Act will result in increased pollution control cost. This is directly contrary to the admissions of Wyoming's other "experts" that all Oklahoma plants can burn a 10%-90% Oklahoma to Wyoming coal blend without violating any emissions standards. It is also contrary to the uncontroverted Affidavit of James Hamm, who was the Construction Engineer and helped design the GRDA No. 2 plant.

On table 3 attached to her report, Ms. Rathbun has a single asterisk by several of the numbers appearing on the table. The single asterisk, according to the legend, is the "1988 actual average price paid by Oklahoma utilities". The figure of a $1.014 is supposedly the actual average spot coal price paid by Oklahoma utilities for Wyoming spot coal in 1988. However, pursuant to Stipulation Number 17 of the Stipulations agreed to by Wyoming and Oklahoma in this case, no Wyoming spot coal was sold to any Oklahoma electric utilities in 1988. In fact, in the two years previous to 1988, only a single utility, at one of its two plants purchased any Wyoming spot coal. (See Stipulation No. 15). Not only is Ms. Rathbun's data suspect but her use of a single utility's spot coal purchases at only one of its plants is hardly a representative sample.

The most egregious indication of bias appears at page 4 of Ms. Rathbun's report under the heading "Coal Price Assumptions". Ms. Rathbun states the following in the fourth sentence of the first full paragraph under that heading:

> Second, we assumed that, on average, Oklahoma utilities could purchase up to 10.51% of their coal supplies (i.e., on a BTU basis) on the spot market or under a new contract and were only required to purchase 89.49% percent of the requirements under their current long-term contracts with Wyoming coal suppliers.

This sentence contains a footnote reference to the bottom of the page under footnote 8 where Ms. Rathbun has selected the year 1985 as a representative year for spot coal purchases. The State of Wyoming and the State of Oklahoma, in Stipulation No. 16,

stipulated to spot coal purchases from 1984 to 1987. The years 1984 to 1986 are relevant because the Oklahoma Act under attack in this case was not yet in effect. If one adds up the total spot coal tons purchased in each of those years, one will find that in 1984, all of Oklahoma utilities purchased a total of 503,590 tons on the spot market from Wyoming. In 1985, all Oklahoma utilities purchased 1,311,600 tons of spot Wyoming coal. The following year all Oklahoma utilities only purchased 102,120 tons of Wyoming spot coal. With all three of these years to choose from, Ms. Rathbun has conveniently selected 1985 where the spot ton purchases were over 2 1/2 times the level of the previous year and 13 times the number of the year immediately following. This is extremely relevant to Ms. Rathbun's preconceived conclusion because her table assumes a rather low dollar figure ($1.014) for spot ton purchases compared to $1.50 for Wyoming contract purchases. Obviously, if she assumes more spot Wyoming coal is purchased, it will magnify the alleged impact of the Act because of the lower assumed spot coal price. The State of Oklahoma submits that this demonstrates a bias on Ms. Rathbun's part and the Special Master should not be impressed by the fact that she used a complicated computer model to come up with faulty conclusions. As stated previously, the entire affidavit is based on the incorrect assumption that rate-payers in Oklahoma can pay higher rates because of the Act. That would assume that utilities are paying more for Oklahoma coal which is, in and of itself, not established. Oklahoma would submit that the well-recognized phrase in the computer industry "garbage in-

garbage out" is an appropriate characterization of Ms. Rathbun's conclusions attached to her affidavit.

Contrary to Wyoming's bald assertions, the State of Oklahoma has preeminent concern for its ratepayers. The State of Oklahoma submits that it has produced and supported the legitimacy of its local purposes advanced in defense of the Act and the Act is constitutional.

PROPOSITION IV

OKLAHOMA STATUTE IS AN INTEGRAL PART OF ITS REGULATION OF ELECTRIC UTILITY RATES.

(Reply to III of Wyoming's Response Brief)

The State of Oklahoma chooses not to specifically respond to III of Wyoming's Response Brief and would submit that its argument on this point contained in Proposition III of its Brief in Support of Motion for Summary Judgment adequately address the legal issues.

PROPOSITION V

THERE ARE NO MATERIAL FACTS IN DISPUTE ON THE QUESTION OF WYOMING'S LACK OF STANDING, BUT THERE ARE MATERIAL FACTS IN DISPUTE ON THE MERITS OF WYOMING'S CONSTITUTIONAL CHALLENGE.

(Reply to V of Wyoming's Response Brief)

The State of Oklahoma agrees that there are no material facts in dispute regarding Wyoming's lack of standing. The State of Wyoming doesn't sell coal. Any loss of severance tax revenue has been self-inflicted or is the result of declining coal prices. The amount of Oklahoma coal sold to Oklahoma utilities compared with the State of Wyoming's total coal production is insignificant.

(.43% to .52%). Wyoming's severance tax is not on the sale of coal and is assessed whether the coal is sold or not. The facts on the merits of Wyoming's constitutional challenge are in dispute and do require a hearing should the Special Master in the Supreme Court disagree with the state of Oklahoma standing argument.

The State of Wyoming has attempted to show that the burning of Oklahoma coal results in higher operational costs. The Flaim/Hemphill Report, relied upon by Wyoming, and the James Hamm Affidavit in support of Oklahoma's Motion for Summary Judgment conflict on this point. The State of Wyoming has spent a great deal of time in its response to Oklahoma's Summary Judgment Motion to imply that utility ratepayers will actually pay higher utility rates as a result of Oklahoma's Act. Wyoming's assertion is based on conjecture and false assumptions, and the Act on its face forbids ratepayers from paying higher cost. This constitutes a material fact in dispute.

Wyoming states that Oklahoma's Act is not related to the regulation of utility rates. The State of Oklahoma disagrees and this fact is part of Oklahoma's defense of its statute.

In summary, if the Special Master does not agree with the State of Oklahoma's standing argument, this case is inappropriate for summary judgment on the merits of the statute. The State of Oklahoma should be allowed to present evidence to show its legitimate local purposes.

CONCLUSION

On the basis of the foregoing arguments and citations of authority, the State of Oklahoma respectfully submits that the special master should recommend granting judgment in favor of the State of Oklahoma. Should the Special Master elect not to make such a recommendation, the State of Oklahoma submits that the Special Master conduct a hearing or hearings to hear further evidence from the parties and particularly to hear evidence from the State of Oklahoma on the legitimate local purposes of Oklahoma's Act.

Respectfully submitted,

ROBERT H. HENRY
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CERTIFICATE OF MAILING

On this _____ day of December, 1989, a true and correct copy of the foregoing was mailed to:

Mary Guthrie
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_____
Neal Leader

NL/vid/1271.brf

(8)

No. 112, Original

Supreme Court, U.S.
FILED
JUN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

REPORT OF SPECIAL MASTER

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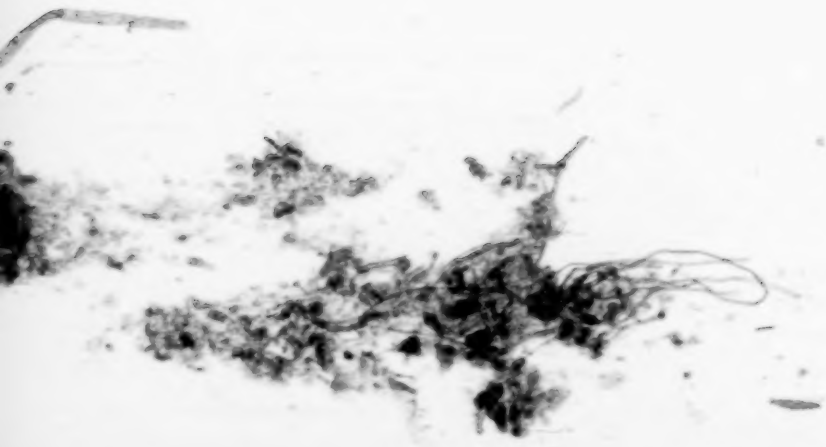

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No. 112, Original

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STATE OF OKLAHOMA,

Defendant.

REPORT OF SPECIAL MASTER

INTRODUCTION

An Oklahoma statute requires Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal that contains at least ten percent Oklahoma-mined coal. OKLA. STAT. tit. 45, § 939 (Supp. 1986). In this original action against Oklahoma in this Court, Wyoming asserts that the statute violates the Commerce Clause of the Constitution, art. I, § 8, cl. 3.

The Court granted Wyoming leave to file its bill of complaint over Oklahoma's objection. (108 S. Ct. 2893.) Oklahoma then filed a motion to dismiss the complaint and an answer. The Court denied the motion to dismiss (109 S. Ct. 300) and referred the case to the undersigned as Special Master (109 S. Ct. 1334).

Both parties having stated that they intended to move for summary judgment, a discovery and briefing schedule was set and later extended at the request of the parties. Both parties filed motions for summary judgment and briefs in support and in opposition.

Each of the parties then, at the direction of the Special Master, filed a statement identifying what it contended would be genuine issues as to material facts if its motion for summary judgment were denied and the opposing party's motion for summary judgment were yet to be ruled upon. After examining these submissions, I have concluded that there is no genuine issue as to any material fact, and I recommend that the Court deny Oklahoma's motion, grant Wyoming's motion, and enter summary judgment for Wyoming for the reasons to be stated.

RECOMMENDED FINDINGS OF FACT

The parties have entered into an agreed stipulation of facts. They have also submitted affidavits and other materials in support of their respective motions for summary judgment. The findings that follow are based on the stipulation and unrebutted submissions. Although the parties disagree on several issues of fact, and therefore no findings are made on those issues, in my opinion those issues are not material and this is an appropriate case for summary judgment.

A. Wyoming's Severance Tax.

Wyoming imposes a severance tax on coal extracted from land within the state, WYO. STAT. §§ 39-6-301 to 39-6-308 (1977). The tax is assessed against the person or company extracting the coal and is payable when the coal

is extracted, regardless of when it is ultimately sold. The valuation of the coal for severance tax purposes is based on its fair market value and is assessed in accordance with WYO. STAT. § 39-2-202 (1977).

Since 1981, Wyoming has collected severance taxes on coal extracted by eight mining companies that sell coal to four Oklahoma electric utilities. These utilities are Oklahoma Gas and Electric Company, Public Service Company of Oklahoma and Western Farmers Electric Cooperative, all privately owned, and Grand River Dam Authority, an agency of the State of Oklahoma.

B. The Oklahoma Act.

In March, 1986, the Oklahoma legislature adopted, and the governor signed, the Act challenged in this case, Act of March 26, 1986, Ch. 43, 1986 Okla. Laws 74 (codified at OKLA. STAT. tit. 45, §§ 939 and 939.1 (Supp. 1986)). The Act, which became effective January 1, 1987, provides as follows:

> Coal-fired electric generating plants—burning Oklahoma coal.
>
> All entities providing electric power for sale to the consumer in Oklahoma and generating said power from coal-fired plants located in Oklahoma shall burn a mixture of coal that contains a minimum of ten percent (10%) Oklahoma-mined coal, as calculated on a BTU ("British Thermal Unit") basis.

OKLA. STAT. tit. 45, § 939 (Supp. 1986). The Act further provides:

> Cost increases to consumers and impairment of certain contracts prohibited.
>
> The cost to the entity shall not increase cost to the consumer or exceed the energy cost of existing long-

> term contracts for out-of-state coal preference including preference given Oklahoma vendors as provided in Section 85.32 of Title 74 of the Oklahoma statutes.

Id. § 939.1.

C. Purpose of the Oklahoma Act.

The same Oklahoma legislature, the Fortieth, at its session the previous year, had adopted a concurrent resolution "requesting Oklahoma utility companies using coal-fired generating plants to blend ten percent Oklahoma coal with their present use of Wyoming coal." Okla. S. Res. 20, 40th Leg., 1985 Okla. Sess. Laws 1694. The resolution stated that compliance would have the effect of "keeping a portion of ratepayer dollars in Oklahoma and promoting economic development" and also stated:

> WHEREAS, The coal-fired electric plants being used by Oklahoma utilities are exclusively using Wyoming coal; and . . .
>
> WHEREAS, A 1982 Ozark Council Report states that $9 million of the ratepayers [sic] dollars was paid as severance tax to the State of Wyoming; and . . .
>
> NOW, THEREFORE, BE IT RESOLVED . . . :
>
> THAT Oklahoma utilities using coal-fired generating plants seriously consider using a blend of at least ten percent Oklahoma coal with Wyoming coal . . . [and]
>
> THAT the result of such a blend would assure at least a portion of the ratepayer dollars remaining in Oklahoma and enhancing the economy of the State of Oklahoma. . . .

Id.

As the statistics on coal purchases by the utilities reported below at pp. 7-8 show, only one of the four util-

ities heeded this precatory resolution, and that one did so only to the extent of purchasing two-fifths of one percent of its requirements from an Oklahoma producer. The following March, at its second session, the legislature adopted the challenged Act, thus mandating the ten-percent minimum purchases that the resolution the previous year had requested.

Sixteen months after the effective date of the Act, there having been substantially less than full compliance by any of the utilities, *see* pp. 7-8 below, the next Oklahoma Legislature adopted a concurrent resolution directing the Grand River Dam Authority, to comply with the Act. Okla. S. Res. 82, 41st Leg., 1988 Okla. Sess. Laws 1915. That resolution included the following recitals:

> WHEREAS, the passage of [the Act] has provided over 700 new jobs in Oklahoma's coal mining industry and related employment sectors; and . . .
>
> WHEREAS, another benefit of [the Act] is an additional $31 million of taxable income has been generated through the purchase of Oklahoma-mined coal . . .

Id.

In this proceeding, Oklahoma asserts that these resolutions should not be considered as evidence of the Oklahoma legislature's purpose in adopting the Act, and that the Act was adopted for other purposes. When asked by Wyoming's Request for Admissions to admit that "[t]he passage of the Act was for the purpose of enhancing and encouraging the production and sale of coal mined in Oklahoma," Oklahoma answered as follows:

> Admitted in part and denied in part. The Act . . . was designed to promote lower utility rates in Oklahoma by insuring that Oklahoma electric utilities would not

> become solely reliant on a single source of supply primarily shipped by a single railroad company. Reliance on sole suppliers and shippers constituted a threat to competitive utility rates. The threat to reasonable utility rates was made even greater when Congress lifted rail price controls.
>
> Oklahoma's Act . . . eliminated this sole reliance, increased competition and lessened the likelihood that Oklahoma utility ratepayers would be harmed by energy supply cutoffs. Oklahoma admits that in advancing the interests of its ratepayers, it chose also to enhance local production and availability of coal.

Oklahoma's Response to Wyoming's Request for Admission No. 1.

D. The History of Purchases of Wyoming-Mined Coal by Oklahoma Electric Utilities.

During the years 1981 through 1986, the four Oklahoma electric utilities had purchased nearly 100 percent of their coal from Wyoming sources. After January 1, 1987, the effective date of the Act, these utilities reduced their purchases of Wyoming coal and purchased some coal mined in Oklahoma. The following charts show the percentages of each utility's purchases of Oklahoma-mined coal and Wyoming-mined coal on an annual basis from 1981 to the first four months of 1989:

Grand River Dam Authority

Year	Percentage of Coal Purchased From Wyoming	From Oklahoma
1981	100.0	0.0
1982	100.0	0.0
1983	100.0	0.0
1984	99.5	0.5
1985	100.0	0.0
1986	96.8	3.2
1987	95.5	4.5
1988	96.6	3.4
1989 (Jan.-Apr.)	97.4	2.6

Oklahoma Gas and Electric Company

Year	Percentage of Coal Purchased From Wyoming	From Oklahoma
1980	100.0	0.0
1981	100.0	0.0
1982	100.0	0.0
1983	100.0	0.0
1984	100.0	0.0
1985	99.6	0.4
1986	98.0	2.0
1987	93.9	6.1
1988	92.6	7.4
1989 (Jan.-Apr.)	96.7	3.3

PUBLIC SERVICE COMPANY OF OKLAHOMA

Year	Percentage of Coal Purchased From Wyoming	Percentage of Coal Purchased From Oklahoma
1980	100.0	0.0
1981	100.0	0.0
1982	100.0	0.0
1983	100.0	0.0
1984	99.7	0.3
1985	100.0	0.0
1986	98.1	1.9
1987	94.3	5.7
1988	96.5	3.5
1989 (Jan.-Apr.)	96.8	3.2

WESTERN FARMERS ELECTRIC COOPERATIVE

Year	Percentage of Coal Purchased From Wyoming	Percentage of Coal Purchased From Oklahoma
1981	100.0	0.0
1982	100.0	0.0
1983	100.0	0.0
1984	100.0	0.0
1985	100.0	0.0
1986	100.0	0.0
1987	94.2	5.8
1988	95.7	4.3
1989 (Jan.-Apr.)	94.6	5.4

(Stipulation, ¶¶ 10-12).

At the time the Act went into effect, all Wyoming coal destined for Oklahoma utilities was shipped over the Burlington Northern Railroad. Pursuant to federal statute, the rates for transportation by rail between Wyoming and Oklahoma are regulated by the Interstate Commerce Commission. 49 U.S.C. § 11501 *et seq.* (1982). This federal regulatory scheme preempts any state regulation of interstate rail rates. *See State of Texas v. United States*, 730 F.2d 339, 347 (5th Cir.), *cert. denied*, 469 U.S. 892 (1984).

E. The Properties of Wyoming-Mined Coal Compared with Oklahoma-Mined Coal.

Although not relevant in my view of the case, the comparative properties of Wyoming and Oklahoma coal have been stipulated by the parties. Their stipulation is in substance as follows:

Wyoming-mined coal has a lower average sulfur content but also a lower average BTU (British Thermal Unit) rating than Oklahoma-mined coal. Sulfur escapes and pollutes the air when the coal is burned. BTU rating reflects the heat generating efficiency of the coal when burned.

Coal extracted from Wyoming's Powder River Basin, the source of Wyoming-mined coal shipped to Oklahoma electric utilities since 1980, has had an average sulfur content between .38 and .40 as a percentage of weight. (Stipulation, ¶ 24.) The average sulfur content of Oklahoma coal delivered to Oklahoma utilities since 1985 has ranged from 1.20 to 1.51 as a percentage of weight. (Stipulation, ¶ 25.)

Oklahoma coal used by Oklahoma electric utilities has a higher average BTU rating than the Wyoming-mined coal

they use. This means that it takes less of this Oklahoma-mined coal by weight to generate the same amount of energy as the Wyoming-mined coal used by the Oklahoma utilities.

RECOMMENDED CONCLUSIONS OF LAW

The cross motions for summary judgment present three legal issues that require a recommendation to the Court:

1. Whether Wyoming has standing to bring this action.
2. Whether the Act, in requiring that Oklahoma utilities burn a mixture of coal at least ten percent of which was mined in Oklahoma, violates the Commerce Clause of the Constitution, art. I, § 8, cl. 3.
3. Whether the Act's application to coal purchases by the Grand River Dam Authority, which is owned by the State of Oklahoma, is severable from the rest of the Act so that its constitutionality may be considered under the "market participant" doctrine, and, if so, whether the Act is valid insofar as it applies to the Authority.

These legal issues can be resolved without deciding any genuine issue of material fact. Summary judgment is therefore appropriate.

I.

Wyoming's Standing to Sue

Oklahoma argues that Wyoming lacks standing to bring this original action. Essentially the same argument was twice presented by Oklahoma to the Court, first in opposition to Wyoming's motion for leave to file the complaint and again, after the complaint had been filed, in

support of Oklahoma's motion to dismiss. As noted above, the Court granted leave to file and denied the motion to dismiss before entering its order of reference. It is inferable that the motion to dismiss was denied on the merits. On at least one occasion when the Court's intention with respect to a dispositive motion has been otherwise, it has referred the motion to the Special Master. *See Maryland v. Louisiana*, 451 U.S. 725, 734-35 (1981) (after granting leave to file, 442 U.S. 937, the Court referred a motion for judgment on the pleadings to a Special Master, 445 U.S. 913). I recommend that the Court adhere to what appears to be its determination that Wyoming has standing to bring this action.

Oklahoma argues that any injury to Wyoming's severance tax revenues is indirect and derivative. The causal link between the Act and Wyoming's tax revenues is said to be attenuated because the tax applies to the extraction rather than the sale of the coal.

The effect of the Oklahoma statute has been to deprive Wyoming of severance tax revenues. It is undisputed that since January 1, 1987, the effective date of the Act, purchases by Oklahoma electric utilities of Wyoming-mined coal, as a percentage of their total coal purchases, have declined. (*See* pp. 7-8, *supra*.) The decline came when, in response to the adoption of the Act, those utilities began purchasing Oklahoma-mined coal. The coal that, in the absence of the Act, would have been sold to Oklahoma utilities by a Wyoming producer would have been subject to the tax when extracted. Wyoming's loss of severance tax revenues "fairly can be traced" to the Act. *See Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

Oklahoma relies on four cases for its contention that Wyoming's loss of revenue is "derivative" and not sufficiently "direct" to support standing. In three of these cases, the courts rejected attempts to base standing on contentions that acts by United States government agencies had injured the state's economy and thereby caused a decline in the state's general tax revenues. *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir.), *cert. denied*, 429 U.S. 977 (1976) (Small Business Administration's classification of disaster area); *State of Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985), *cert. denied*, 478 U.S. 1012 (1986) (Department of Agriculture's implementation of disaster relief programs); *American Motorcyclist Association v. Watt*, 534 F. Supp. 923 (C.D. Cal. 1981) (Department of Interior's implementation of desert conservation plan).

In each case the state relied upon an alleged injury to the state's economy in general and the corresponding effect on general tax revenues, rather than a specific direct injury in the form of a loss of specific tax revenues. None of these cases is analogous to the case at bar. Arguments based on the *parens patriae* doctrine, which is discussed below, were also asserted as alternative grounds of jurisdiction in these cases and were rejected by the courts.

The fourth case Oklahoma cites in support of its indirect and derivative argument is the district court's decision in *Puerto Rico v. Alfred L. Snapp & Son, Inc.*, 469 F. Supp. 928 (W.D. Va. 1979). Oklahoma cites only the district court's decision in that case, however, neglecting to mention the reversal by the Fourth Circuit, 632 F.2d 365 (1980), and the affirmance of the Fourth Circuit's decision by this Court, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592 (1982). (Okla. Br.,

Nov. 1989, p. 16.) Both the Fourth Circuit and this Court sustained standing. This Court's decision in *Snapp* is discussed below in the discussion of the *parens patriae* issue.

This Court has limited the exercise of its original jurisdiction under 28 U.S.C. § 1251(a) to "appropriate cases." *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); *Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976) (per curiam). Whether a case meets this standard depends upon "the seriousness and dignity of the claim" as well as "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. Milwaukee*, 406 U.S. at 93. "Of course, the issue of appropriateness in an original action between States must be determined on a case-by-case basis." *Maryland v. Louisiana*, 451 U.S. at 743.

The present case is appropriate for the exercise of this Court's original jurisdiction because of the nature of Wyoming's claim and the absence of other pending litigation involving the same parties or issues. Like the Commerce Clause challenge raised in *Maryland v. Louisiana*, Wyoming's claim "implicates serious and important concerns of federalism fully in accord with the purposes and reach of [the Court's] original jurisdiction." 451 U.S. at 744. The constitutionality of the Act is not being litigated in another forum; a challenge in the Oklahoma courts brought by a group of Oklahoma consumers recently was dismissed for lack of standing. *See Northeast Oklahoma Electric Cooperative, Inc. v. Grand River Dam Authority*, Case No. C-88—127 (Dist. Ct. Craig Cy., Okla.) (consumers did not suffer injury because the Act prohibits any increase in cost to consumers).

Oklahoma also argues that Wyoming has only itself to blame for any reductions in severance tax revenues, because it has lowered its severance tax rate (from 10.5 percent in 1986 to 8.5 percent in 1987) and has based the tax on the coal's market value, which has been declining, rather than on tonnage produced.

That Wyoming could have recovered additional severance tax revenues by maintaining a higher severance tax rate or by basing the tax on volume has no relevance to the loss of severance tax revenues on coal sold to Oklahoma utilities. The availability of alternative means of generating tax revenues is not analogous to the reciprocity provisions that the Court has held to constitute "self inflicted injury." *See Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam) (each plaintiff state's own policy of giving taxpayers credit for commuter taxes paid in neighboring states caused the injury to the state and, therefore, the state had no standing to challenge the constitutionality of the commuter taxes).

An additional question relating to standing is whether Wyoming may assert grounds that are not stated in its complaint, in which the only ground pleaded is the one just discussed, *i.e.*, that the challenged Oklahoma statute reduces the severance taxes Wyoming collects on coal mined in the state. The unpleaded grounds are additional effects of the statute, *viz.*, (a) reduction of the amount of *ad valorem* taxes Wyoming collects on the coal mined in Wyoming, which are used to finance various local government functions, and (b) reduction of the royalties received on coal mined from federally owned land in Wyoming, which are shared equally between Wyoming and the federal government. Oklahoma contends that Wyoming, because it pleaded only the severance-tax effect, cannot prove or argue other effects. Wyoming responds that on

a motion for summary judgment "the formal issues framed by the pleadings are not controlling," citing 10A Wright, Miller and Kane, *Federal Practice and Procedure* § 2721, p. 43 (1983). (Reply Brief, p. 17, n.9.)

The order appointing the Special Master, as is customary, grants the Special Master "authority to fix the time and conditions for filing of additional pleadings." (109 S. Ct. 1334.) Assuming this authority includes granting leave to amend, it would be inappropriate to exercise it here, because Wyoming has not sought leave to amend. In any event, it is unnecessary to consider the additional grounds, because standing exists for the reason already stated.

Wyoming's standing based on its direct injury makes it unnecessary to consider whether the *parens patriae* doctrine would give Wyoming standing. If, however, the only basis asserted for standing were the *parens patriae* doctrine, I would recommend that the Court determine that Wyoming lacks standing.

A state may bring a federal action as *parens patriae* only if the state articulates a "quasi-sovereign" interest, "apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. at 607. In the *Snapp* case the Court recognized as quasi-governmental the Territory's interests in the health and well-being of its general population and in assuring that the benefits of the federal system were not denied its general population. The allegations on the basis of which Puerto Rico's standing was sustained were that certain apple growers in Virginia had violated federal laws that gave laborers who were United States citizens preference over foreign temporary laborers. Analyzing and applying the Court's decisions on standing and the *parens patriae* doctrine, *id.* at 600-10, the Court held that stand-

ing was established by allegations that the defendants "discriminated against Puerto Ricans in favor of foreign laborers," and "that Puerto Ricans were denied the benefit of the access to domestic work opportunities that [certain federal statutes] were designed to secure for United States workers," *id.* at 608. These allegations were held "to fall within the Commonwealth's quasi-sovereign interests and, therefore . . . [to] support a *parens patriae* action." *Id.*

In *Snapp*, only 780 Puerto Rican workers were victims of Virginia's discrimination, and the impact on the economy of Puerto Rico was, therefore, concededly slight. The Court nevertheless held that the Puerto Rico could bring a *parens patriae* action. The Court noted that a state has a quasi-sovereign interest in the health and well-being, physical and economic, of its residents in general and in not being denied its rightful status in the federal system, including an "interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce," 458 U.S. at 608 (citing *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)).

Justice Brennan's concurring opinion in *Snapp*, joined by three other Justices, points out, however, that a *parens patriae* action may be cognizable in a federal district court but nevertheless may not be an appropriate case for the exercise of the Supreme Court's original jurisdiction. Different considerations are applicable to the exercise of original jurisdiction, including the institutional limitations on the Court's ability to accommodate such actions. 458 U.S. at 610-11. If the instant action had been brought in a district court, the right of Wyoming to proceed as *parens patriae* would be evaluated by different standards, and a closer question would be presented. Wyoming has alleged injury, however, aside from its loss of tax revenues, to a select

group of coal producers rather than its general population. I would not recommend that standing be recognized on the basis of the *parens patriae* doctrine.

II.

The Commerce Clause Issue

A. General Principles.

Although the Commerce Clause, art. I, § 8, cl. 3, literally read, is a grant of power to Congress, it has long been interpreted as "directly limit[ing] the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35-36 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). This "negative" aspect of the Commerce Clause arises from "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual states within their respective spheres." *Healy v. Beer Institute, Inc.*, 109 S. Ct. 2491, 2499 (1989). In its negative aspect the clause prohibits "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273-274.

The Court has distinguished between state statutes that have only an "incidental" effect on interstate commerce, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and those that clearly discriminate against interstate commerce, *see New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 36-37; *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978). It has been said that if the statute "regu-

lates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. In contrast, when the state statute amounts to simple economic protectionism, a "virtually *per se* rule of invalidity" has been applied. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See, e.g., Maine v. Taylor*, 477 U.S. 131, 148 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

The Court said in *Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986), "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." The Court also has observed that "state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274. Even state laws that respond to legitimate local concerns violate the Commerce Clause if they discriminate arbitrarily against interstate commerce, for "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. at 626.

Despite the two-tiered approach based on the distinction between "incidental" and "direct" effects on interstate commerce, the Court has acknowledged "that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce*

Church balancing approach." *Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. at 579. Under either approach, the critical consideration is the statute's overall effect on both local and interstate commerce. *Id.*; *Healy v. Beer Institute, Inc.*, 109 S. Ct. 2491, 2499 (1989).

It is for the Court to determine whether the purpose of a challenged statute relates to a legitimate local concern, and the "name, description or characterization given it by the legislature or the courts of the State" do not bind the Court in making that determination. *Hughes v. Oklahoma*, 441 U.S. at 336. Almost any state law burdening interstate commerce can be rationalized as a regulatory measure intended to protect the citizens of the state. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S 511, 523 (1935). Uncritical deference to the state's assertion of purpose "would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

B. The Oklahoma Act Discriminates Against Interstate Commerce on Its Face and in Practical Effect.

The initial inquiry is whether the statute discriminates against interstate commerce on its face or in practical effect. From the language of the Oklahoma Act and the stipulated evidence concerning the source of coal purchased by Oklahoma utilities before and after the adoption of the Act, it appears that the Act is discriminatory in both respects.

Section 939 of the Act expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other states. This prefer-

ence for coal from domestic sources cannot be characterized as anything other than protectionist, because it purports to exclude coal mined in other states based solely on its origin. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274 ("The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination"); *Philadelphia v. New Jersey*, 437 U.S. at 626-27 (the Commerce Clause forbids discrimination "against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

The stipulated evidence confirms that the Act is discriminatory in effect as well as on its face. From 1981 to 1986, Wyoming provided nearly 100 percent of the coal purchased by Oklahoma utilities generating electrical power for Oklahoma consumers. Following the effective date of the Act, January 1, 1987, Oklahoma utilities purchased Oklahoma coal in amounts ranging from 3.4% to 7.4% of their needs on an annual basis and reduced their purchases of Wyoming-mined coal by corresponding amounts. (*See* pp. 7-8, *supra*.)

Oklahoma argues that it is significant that the Act sets aside only a "small portion" of the Oklahoma coal market and does not place an "overall burden" on out-of-state coal producers doing business in Oklahoma. (Okla. Nov. 1989 Br., p. 30.) The volume of commerce involved, however, does not determine whether a statute discriminates against interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 268-69 (tax exemption for domestic wines improperly discriminated against interstate commerce, despite the small volume of sales and the absence of a present

competitive threat); *cf. New Energy Co. of Indiana v. Limbach*, 486 U.S. at 276-277 ("Varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field."). The undisputed evidence demonstrates that the Act has caused Oklahoma utilities to purchase substantial quantities of coal from Oklahoma mines that, in the absence of the Act, they would have purchased from Wyoming mines.

The discrimination against interstate commerce contained in Section 939 of the Act is not diminished by Section 939.1. The latter provision protects Oklahoma consumers from any cost increase due to compliance with the Act and relieves Oklahoma utilities from compliance with the Act if the cost of Oklahoma coal "exceeds the cost of existing long term contracts for out-of-state coal." The possibility that the Act may in some circumstances relieve Oklahoma utilities of the obligation to purchase Oklahoma-mined coal does not eliminate its discriminatory effect. *Philadelphia v. New Jersey*, 437 U.S. at 628 (a New Jersey statute prohibiting importation of waste from other states, albeit with exceptions, was held to be an impermissible barrier against movement of interstate commerce); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 40-42 (a Florida statute prohibiting some, but not all, out-of-state investment concerns from entering local markets was held to violate the Commerce Clause). Also irrelevant are disputed issues relating to the interpretation of Section 939.1 and the comparison of "spot" coal prices with long-term contracts for Wyoming coal. (*See* September 1989, Wyo. Br., p. 26); November 1989 Okla. Br., p. 10.)

C. The Act's Deliberate Discrimination Against Interstate Commerce Is Not Justified by Any Purpose Advanced by Oklahoma.

1.

Oklahoma argues that the Court must accept its proffered justifications for the statute and ignore the Oklahoma legislature's resolutions expressing a protectionist purpose because, under Oklahoma law, legislative resolutions are not evidence of the intent of the legislature.

The 1985 resolution was adopted in the first session of the same Oklahoma legislature that adopted the challenged statute in its second session the following year. The resolution "request[ed] Oklahoma utility companies using coal-fired generating plants to consider plans to blend ten percent Oklahoma coal with their present use of Wyoming coal." Okla. S. Res. 20, 40th Leg., 1985 Okla. Sess. Laws 1694. When the utilities failed to heed this request, the same legislature promptly adopted the challenged statute, mandating what it had requested the previous year. (*See* pp. 4-5, *supra*.)

Oklahoma argues, however, that under that state's law "a legislative resolution is merely an expression of opinion and has no force or effect of law," and that "[o]nly measures passed by both houses of the legislature and then signed by the Governor become law in Oklahoma." (Okla. November 1989 Br., p. 32.) Oklahoma also asserts, citing a case in which the legislature had attempted to interpret an existing statute by a resolution (*Stephens Produce Co. v. Stephens*, 332 P.2d 674 (Okla. 1958)), that the resolution is not part of the legislative history of the act because under Oklahoma law legislative resolutions "may not be used to express legislative intent." (Okla. Nov. 1989 Br., p. 32.) Yet in its answer to a Wyoming interrogatory, served in the discovery phase of this case,

asking why the Oklahoma legislature adopted the statute, Oklahoma acknowledged that resort may be had to, *inter alia*, "available legislative history." (Answers to Wyoming's Interrogatory No. 2.)

When deciding whether a state statute is consistent with the United States Constitution, this Court should not be foreclosed by a rule of state law from examining, in order to determine the purpose of the statute, joint resolutions of the legislature that adopted the statute. If the legislative resolution were considered, it would be impossible rationally to escape the conclusion that the challenged statute was adopted for a protectionist purpose, despite Oklahoma's present protestations. In similar circumstances, the Court dismissed a reason advanced by the state after passage of a challenged statute as having "the flavor of *post hoc* rationalization," the "bare assertion" of which "is certainly inadequate to survive the scrutiny invoked by the facial discrimination of" the statute. *Hughes v. Oklahoma*, 441 U.S. at 338 n.20.

The issue of legislative purpose is one of fact, however, *Maine v. Taylor*, 477 U.S. at 144-45, and in view of the teaching of that case it would be inappropriate to grant the motion without receiving evidence as to legislative purpose, if the purposes advanced by Oklahoma, assuming them to be the real purposes, would justify Oklahoma's statute under the Commerce Clause.

2.

Oklahoma does not, however, seek to offer evidence that the purposes of the Act were as it asserts. Its Statement of Genuine Issues filed in connection with the motions for summary judgment lists issues that relate only to the effect of the Act, not to its purpose. It will nevertheless be assumed for present purposes that Oklahoma would

argue that its purpose is shown by the effects, and, further, that Oklahoma is correct in that argument.

Oklahoma's Statement of Genuine Issues lists six issues, all related to the effects of the Act:

1. Whether the Act "fosters an increase in coal suppliers," resulting in "more competitive coal prices and/or transportation prices."

2. Whether it "increases the availability of local supplies of coal and thus lessens the likelihood . . . and potential impact of fuel shortages or cutoffs" of coal.

3. Whether it "preserves the availability of local coal supplies," thereby reducing the need for "expensive rail shipping."

4. Whether the Act, in fostering competition and local coal prices, "lessens the likelihood of higher utility rates to the Oklahoma taxpayer."

5. Whether it "assists in the regulation of utility rates."

The sixth issue listed by Oklahoma, *viz.*, "Whether the State of Wyoming has suffered any direct injury from Oklahoma's Act," can be put aside here, because the pertinent facts are not in dispute and the direct-injury issue is dealt with in Part I above.

If it is assumed that the five other listed issues should be answered in the affirmative, Oklahoma still has not met its heavy burden of constitutionally justifying the discrimination against interstate commerce. Issues 1, 3, 4 and 5 are purely economic. Issue 2, relating to potential fuel shortages or cutoffs, purports to be more than economic, but it cannot be accepted as a justification for trade barriers in view of the reasoning of the Court in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, and

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-38 (1949).

Baldwin is described by Professor Tribe as "the leading case" in the line of cases holding unconstitutional under the Commerce Clause "[s]tate efforts to protect local economic interests through measures limiting access to local markets by out-of-state sellers or suppliers." Tribe, *American Constitutional Law* 413-14 (2d Ed. 1988). That case dealt with a New York statute that provided for a minimum price for milk sold by producers to dealers. To prevent out-of-state milk producers from undercutting the price, the statute also prohibited resale within the state of any milk purchased outside the state at prices lower than the minimum price. The Court held the statute to be a barrier to trade violative of the Commerce Clause. The justification asserted by New York and found by the Court to be insufficient was, in Justice Cardozo's words, as follows:

> The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income .... [T]he economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich.

The Court stated further,

> To give entrance to that excuse would be to invite a speedy end to our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Id. at 523. Accepting the state's justification as sufficient, said Justice Cardozo, "would be to eat up the rule under the guise of an exception." *Id.*

The Court went on in *Baldwin* to deal with another argument, *viz.*, that the higher prices were justified as a means of removing the temptation for out-of-state milk producers to save money at the expense of sanitary precautions. There were other means of accomplishing this objective that would not impermissibly burden commerce, said the Court. *Id.* at 524.

In the case at bar, Oklahoma's exclusion of ten percent of the coal to be used by Oklahoma utilities is analogous to the burden placed on commerce in *Baldwin*. Assuming that one of the purposes of the Oklahoma statute is the non-economic one of protecting Oklahoma consumers from coal shortages, that purpose is no more benign or important than that asserted by the state in *Baldwin* and held by the Court to be an insufficient justification for the statute.

In *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 531-533, 535, 538, Justice Jackson, writing for the majority of six justices, quoted from and relied upon the *Baldwin* decision in holding another New York statute invalid as applied. The statute had been applied to deny a New York license for an additional milk-receiving plant proposed to be used for receiving milk to be sent out of state for processing and consumption. The asserted justifications were that the proposed plant would divert milk from other plants, increasing the costs of handling milk at these plants and depriving them of milk needed during seasons of shortage, and also "would tend to a destructive competition in a market already adequately served." 336 U.S. at 529. Speaking of the Commerce Clause's implied ban on economic protectionism, the Court said,

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition,

> has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. [511], 527, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'

336 U.S. at 537-38. *See also Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (state cannot prohibit export of shellfish); *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 956-58 (1982) (state cannot use reciprocity rule to prohibit export of ground water); *West, Attorney General of the State of Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229, 261-62 (1911) (state cannot prohibit export of natural gas); *Pennsylvania v. West Virginia*, 262 U.S. at 596 (state cannot prohibit export of coal).

Oklahoma's statute conflicts with this principle of political unity. Oklahoma attempts to protect its citizens' economic interests at the expense of the tax revenue interests of other states and of the economic interests of coal producers in those other states. If this rationale were accepted, the effect would be, in Justice Cardozo's words, "to eat up the rule under the guise of an exception." *Baldwin v. Seelig*, 294 U.S. at 523.

Neither in *Baldwin* nor in *Hood* did the Court suggest that the statute would have been upheld if the state could have demonstrated that its purpose of assuring the supply of an essential commodity could not have been achieved by available non-discriminatory means, although such a demonstration is usually stated as a part of the balancing test in the Court's opinions (*e.g.*, *Maine v. Taylor*, 477 U.S. at 140; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 958). It would appear that there was no other means of achieving New York's purpose in *Baldwin* or *Hood*. If the no-other-means element were an essential part of the balancing test and the plausibility of

the state's assertion of purpose is not to be questioned, the Commerce Clause would impose few, if any, restraints upon the states. *Cf. Dean Milk Co. v. Madison*, 340 U.S. at 354 (quoted *supra* at p. 19).

In any event, Oklahoma does not argue or offer to prove that the asserted purposes of the Oklahoma Act cannot be achieved by non-discriminatory means. As Professor Tribe has noted, some commentators have expressed the view that the requirement of proof that there are no non-discriminatory alternatives is "so strict that it never could be met." *See* Tribe, *American Constitutional Law* 415-416 n.13 (1988). Tribe describes *Maine v. Taylor*, 477 U.S. 131, in which the burden was found to have been met, as "an exceptional case." In that case the Court rejected a Commerce Clause challenge to a Maine statute prohibiting importation of baitfish into the state. The Court based its holding on an evidentiary showing that the statute was necessary to protect against contamination of Maine fisheries from non-native baitfish, and that no other means of protection was available. The justification found sufficient related to the environment, an area in which, Tribe observes (at 415), the Court has been especially sensitive to the interest and responsibility of the states. I do not understand that case to dilute the principle that the Commerce Clause precludes a state from reserving a segment of a market within the state for sellers in the state. There is no case in which the Court has sustained a state's attempt to do so.

The protectionism embodied in the challenged Oklahoma statute is not a permissible means of protecting the interests the state advances. As the Court stated in *Philadelphia v. New Jersey*, 437 U.S. at 626, "the evil of protectionism can reside in legislative means as well as legislative ends." Here, the legislative means chosen by Oklahoma are explicitly discriminatory and contravene "the

general principle that the Commerce Clause prohibits a state from using its regulatory power to protect its own citizens from outside competition." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44. *See also Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 273.

In summary, I recommend that the Court find that there is no issue of material fact, and that the justification advanced by Oklahoma is an insufficient basis for the challenged statute's discrimination against interstate commerce. For purposes of the recommendation, I accept Oklahoma's representation that the Act was adopted to increase the sources of coal for Oklahoma utilities in order to hold down utility rates over the long term and in order to avoid dependence on the single railroad that delivered coal from Wyoming mines to the Oklahoma utilities; and I also assume that the genuine issues asserted by Oklahoma as precluding summary judgment, pp. 24-25, *supra*, (except for direct injury, which is a legal issue) would be resolved in Oklahoma's favor.

D. The Act Is Not Immune From Commerce Clause Scrutiny as Part of Oklahoma's Regulation of Utility Rates.

Oklahoma also argues that the required use of Oklahoma-mined coal by utilities generating electric power in the state is part of its regulation of retail utility rates and is therefore immune from a challenge under the Commerce Clause. Oklahoma contends that, because the Federal Power Act, 16 U.S.C. § 824 (1982), leaves the regulation of retail electric rates to the states, state regulation of those rates is exempted from the strictures of the Commerce Clause.

Even if it is assumed that the Act constitutes an exercise of Oklahoma's retail utility ratemaking powers, the Act is not exempt from scrutiny under the Commerce

Clause. In reviewing challenges to state laws concerning utility regulation, the Court has applied Commerce Clause analyses. Indeed, the Court has expressly held that § 201(b) of the Federal Power Act, which contains the same language as § 824(b), on which Oklahoma relies, does not constitute an affirmative grant of authority permitting the states to burden interstate commerce. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341-343 (1982). Oklahoma attempts to distinguish the holding in *New England Power Co.* on the grounds that the case involved a complete ban on hydroelectric power, which was clearly outside that the "lawful authority" contemplated when the Federal Power Act was passed in 1935, *see* 16 U.S.C. § 824(b) (1982). No authority is cited, however, suggesting that in-state purchase quotas imposed on utilities in an effort to regulate utility rates are within the "lawful authority" referred to in Section 824(b), or that a partial rather than a complete ban on interstate commerce is permissible. State statutes regulating utilities have been subjected to the same scrutiny under the Commerce Clause as other legislation. Although upholding the state statutes reviewed, the Court in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 336-37 (1951) (state law requiring natural gas sellers to obtain a permit did not violate the Commerce Clause), and in *Arkansas Electric Cooperative Corp. v. Arkansas Public Utility Commission*, 461 U.S. 375, 394 (1983) (state regulation of wholesale utility rates) considered the commerce clause challenge on the merits. The challenged statute is not immune from Commerce Clause restraints.

III.

Severability

Oklahoma argues that even if the statute is unconstitutional as it applies to the three privately owned electric utilities in Oklahoma, it should be upheld as it applies to the plant owned and operated by Grand River Dam Authority, an agency of the state, *see* OKLA. STAT., tit. 82, § 861, acting as a market participant.

In applying the Commerce Clause, the Court has drawn a distinction between states acting as market regulators and states acting as market participants. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-10 (1976). Although the Commerce Clause restricts the ability of states to impose tax and regulatory measures burdening interstate commerce, it does not place restrictions upon states acting as market participants in the free market. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 810. If the Oklahoma Act applied only to purchases by the Grand River Dam Authority, it would constitute a purchasing decision by the State. As such, it would fit within the "market participant" exception to the restrictions imposed by the Commerce Clause on state action.

The market-participant exception is available to Oklahoma, however, only if the application of the Act to the Authority may be considered separately, or severed, from its application to privately owned utilities. Severability under these circumstances is to be determined under state law. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623-24 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982).

When the question of severability has arisen in a case originating in a state court, this Court has declined to decide that issue and has remanded the case to the state

court for decision of the issue. *Hooper v. Bernalillo County Assessor*, *supra*, 472 U.S. at 623-24; *Zobel v. Williams*, 457 U.S. 55, 65 (1982). I recommend that a similar course be followed here, even though the state law question arises in the context of applying the commerce clause and the market participant exception to that clause. If the recommendation were followed, this Court would enter judgment with respect to the three privately owned utilities (Oklahoma Gas and Electric Company, Public Service Company of Oklahoma, and Oklahoma and Western Farmers Electric Cooperative) and dismiss the claim insofar as it relates to Grand River Dam Authority, without prejudice to the right of Wyoming to assert the claim as to the Authority in an appropriate forum.

If, however, the Court were to decide to exercise jurisdiction over the claim as to the Authority, I would recommend that its decision be that the application of the Act to the Authority is severable from its application to the three privately owned utilities, and thus protected by the market participant doctrine, for the following reasons.

Oklahoma courts have held that valid portions of a statute are severable "unless it is evident that the Legislature would not have enacted the valid provisions with the invalid provisions removed, if with the invalid provisions removed the rest of the act is fully operative at law." *Englebrecht v. Day*, 208 P.2d 538, 544 (Okla. 1949). The Oklahoma legislature made its intent clear in this instance by including the following severability clause in the Act:

> The provisions of this act are severable and if any part provision shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Act of March 26, 1986, Ch. 43, 1986 Okla. Laws 74. Under Oklahoma law, a severability clause creates a presumption that the legislature would have adopted the statute with the unconstitutional portions omitted. *Englebrecht v. Day*, 208 P.2d 538, 544 (Okla. 1949); *Williams v. Oklahoma*, 542 P.2d 554, 595-96 (Okla. 1975).

Here severing the application of the Act to the Authority from the unconstitutional application to privately owned utilities does not offend the general principle that "[o]rdinarily, exceptions should not be read into [a] statute which are not made by the legislative body." *See Grand River Dam Authority v. Oklahoma*, 645 P.2d 1011, 1018 (Okla. 1982). The purpose of that principle is to assure compliance with the intention of the legislature. *Id.* at 1018; *Udall v. Udall*, 613 P.2d 742, 745 (Okla. 1980). Severance in this case would seem to be consistent with the intent of the Oklahoma legislature.

Alabama Power Company and The Wyoming Mining Association have filed briefs as *amici curiae*, pursuant to leave of Court granted before entry of the order of reference. Burlington Northern Railroad Company has filed a Statement of Endorsement of the brief *amicus curiae* of The Wyoming Mining Association, pursuant to leave granted by the Special Master after entry of the order of reference. These briefs have been considered by the Special Master.

CONCLUSION

For the foregoing reasons, I recommend as follows:

1. Wyoming should be held to have standing to bring this action.

2. Wyoming's motion for summary judgment should be granted and declaratory and injunctive relief should issue with respect to the Act as it applies to Oklahoma Gas and Electric Company, Public Service Company of Oklahoma, and Oklahoma and Western Farmers Electric Cooperative, the privately owned utilities, on the ground that the Act is unconstitutional under the Commerce Clause. As to Grand River Dam Authority, the action should be dismissed without prejudice to its right to assert its claim in an appropriate forum; alternatively, the Act should be held valid insofar as it applies to the Grand River Dam Authority.

3. Oklahoma's motion for summary judgment should be denied.

Respectfully submitted,

PHILIP W. TONE
Special Master

Dated: June 29, 1990

(10)

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In The

Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

On The Report Of The Special Master Dated June 29, 1990

AMICUS CURIAE BRIEF OF THE WYOMING MINING ASSOCIATION SUPPORTING THE STATE OF WYOMING

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STATE OF OKLAHOMA,

Defendant.

AMICUS CURIAE BRIEF OF THE WYOMING MINING ASSOCIATION SUPPORTING THE STATE OF WYOMING

INTRODUCTION

Since January 1, 1987, an Oklahoma statute has required Oklahoma's electric utilities to purchase at least ten percent of their coal supplies from Oklahoma mines. Okla. Stat. tit. 45, § 939 (Supp. 1991). The purpose and effect of the statute is to force the utilities to modify their prior practice of obtaining virtually 100 percent of their coal supplies from Wyoming mines.

In April, 1988, the State of Wyoming instituted this original action to challenge the constitutionality of Oklahoma's blatant interference with the interstate coal market. The Court granted Wyoming leave to file its

complaint, denied the State of Oklahoma's motion to dismiss the complaint for lack of standing, and referred the matter to Special Master Philip W. Tone for his consideration. The parties provided the Special Master with cross motions for summary judgment based on a stipulated set of facts ("SF," attached to Wyoming's Brief). The Special Master now has issued his recommendations to the Court. Report of Special Master Philip W. Tone (June 29, 1990) (hereinafter "Report").

Pursuant to Supreme Court Rule 37.3, the Wyoming Mining Association ("Association") respectfully submits this Brief Amicus Curiae Supporting the State of Wyoming. The Association agrees with the State of Wyoming that the Special Master correctly concluded that the Oklahoma statute is unconstitutional, but erred in recommending that this Court rewrite the Oklahoma statute to permit it to remain in effect on a more limited basis.

INTEREST OF THE AMICUS CURIAE

Oklahoma's actions have had a direct economic impact on the Association's members. The Association's members mine coal in Wyoming and historically have supplied virtually all of the coal burned by Oklahoma's electric utilities. The Oklahoma statute has caused these sales to decline substantially. Other states have adopted (or are threatening to adopt) similar protectionist measures, increasing the injury to the Association's members.

This wave of protectionism comes at a historically significant time. Congress recently revised the Clean Air

Act to impose stringent new limits on coal-burning utilities' sulfur dioxide emissions. But for protectionist barriers like Oklahoma's, the Association's members, all of which produce low-sulfur coal in Wyoming, stand to play a major role in helping utilities meet this important national goal.

The outcome of this proceeding obviously will have a significant impact on the Association's members. This Court recognized as much at the inception of this proceeding when it granted the Association leave to file an Amicus Curiae Brief in Support of Wyoming's Motion for Leave to File a Complaint. Since then, the Association has participated in every stage of this action, and both parties have consented to the Association's participation at this stage. *See* Letters of Consent attached as Appendix B.

SUMMARY OF ARGUMENT

The Special Master has recommended that the Court declare Oklahoma's protectionist statute unconstitutional, but leave it in place as it applies to one state-owned power plant. The first part of the Special Master's recommendation is legally irrefutable. The second part, however, asks the Court to assume a legislative role and rewrite the Oklahoma statute to achieve a questionable result. Legal principles and considerations of public policy demand that this Court strike the statute as it is written, in its entirety.

The State of Wyoming has explained the legal reasons why Oklahoma's statute must fall with respect to all utilities in Oklahoma. The Association submits this brief

for the limited purpose of emphasizing the impact of the Oklahoma statute on the national coal market and the nation's environmental policy. At least ten other states have adopted statutes similar to Oklahoma's "closed-border" law, and the number threatens to grow. These parochial laws severely impede the efficient operation of the national coal market and, because they are aimed primarily at low-sulfur Western coal, hamper the federal environmental policy set forth in the recent amendments to the Clean Air Act, Pub. L. No. 101-549 (1990), making it more difficult for the nation to solve its pressing air pollution problem. The broad implications of this case underscore the unconstitutionality of Oklahoma's statute.

ARGUMENT

I. The Special Master Correctly Concluded That The Oklahoma Statute Imposes An Impermissible Burden On Interstate Commerce.

A formidable body of legal precedent supports the Special Master's recommendation that the Oklahoma statute be struck down as an unconstitutional interference with interstate commerce. As the Special Master recognized, the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, subjects state statutes designed to insulate an in-state industry from out-of-state competition to a "virtually per se rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *see, e.g., Healy v. Beer Inst., Inc.*, 491 U.S. 324, ___, 109 S. Ct. 2491, 2499 n. 14 (1989); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 523 (1989); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988); *Brown-Forman Distillers Corp. v. New*

York State Liquor Auth., 476 U.S. 573, 579 (1986). A statute like Oklahoma's which "overtly blocks the flow of interstate commerce at a State's border" is the clearest example of illegal protectionism. *City of Philadelphia*, 437 U.S. at 624. Such laws invite retaliation and promote the disintegration of the Nation's economy, contrary to the Constitution's fundamental principle of an undivided nation. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1934) (opening door to protectionist rivalries runs counter to philosophy of federalism); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (central concern of Founders was "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"). The facts of this case demonstrate that the Special Master was correct in concluding that Oklahoma's statute cannot withstand this scrutiny.

The Special Master's Report clearly illustrates the significant effect that Oklahoma's statute has had on the flow of coal from Wyoming mines to Oklahoma users. Report at 6-9, 20-21. For example, in 1986, the year before the statute became effective, the Western Farmers Electric Cooperative purchased 100% of its coal from Wyoming and none from Oklahoma. *Id.* at 8. The following year, it purchased 5.8% from Oklahoma. *Id.* This direct impact of the Oklahoma statute is substantial, Report at 20-21, and alone justifies the Special Master's recommendation that the Oklahoma statute be declared unconstitutional. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-69 (1984) (discriminatory statute cannot be saved merely because it affects only a small volume of commerce).

The direct impact of the Oklahoma statute chronicled by the Special Master, however, is merely the tip of the protectionist iceberg that plagues the national coal industry and the millions of Americans who purchase coal-generated electricity. "[T]he practical effect of [Oklahoma's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering . . . what effect would arise if not one, but many or every State adopted similar legislation." *Healy*, 109 S. Ct. at 2499; *accord Hughes*, 441 U.S. at 329-30; *Baldwin*, 294 U.S. at 522-23.

Coal is an extremely important commodity in the national energy market. In 1987 it accounted for 60% of the Nation's electrical generation. National Coal Association, *Steam Electric Plant Factors* at i (1988). Coal is bought and sold in a highly-efficient national market, by long-term contract or by spot-market transaction. Over half of the states produce coal, and competition for markets is fierce. Competition focuses both on the coal's delivered price per unit of energy (different types of coal produce different amounts of energy per ton) and on the coal's burning characteristics (*e.g.*, sulfur content, waste product, etc.). Superiority in either attribute can generate a competitive advantage. *See* Flaim & Hemphill, *The Economic Effects Of Oklahoma Statutes Title 45 § 939. Title 45 § 939.1 and Title 74 § 85.32 On Oklahoma Electric Utilities' Fuel Purchasing Decisions* § 8, at 18 (submitted by the State of Wyoming in support of its Motion for Summary Judgment) (hereinafter "Flaim & Hemphill").

Wyoming coal, which is both cheap to mine and clean burning, is in high demand. Flaim & Hemphill at 18-21. In 1988, Wyoming mines produced 164 million tons of

coal – more than any other state. SF ¶ 29 & Ex. 3. Over 85% of this coal was burned in other states, SF Ex. 4, rendering the Wyoming coal-mining industry highly dependent upon interstate commerce. Like Oklahoma, many of the states to which Wyoming exports have coal reserves of their own. This coal, however, typically costs more to mine than Wyoming coal and produces far more undesirable by-products (namely sulfur dioxide) when burned. *See* Flaim & Hemphill at 2-3, 18-21. Accordingly, the coal industries in these states – like Oklahoma's – are withering in the face of external competitive pressure. Recent changes to the Clean Air Act (*see infra* Parts II & III) place an even greater emphasis on reducing sulfur emissions and thus stand to increase this trend even further.

Coal mining occupies an important place in the history and economy of many of these states, prompting them to turn to protectionist legislation as a means for offsetting their competitive disadvantages in the free market. In addition to Oklahoma, at least ten other states have enacted discriminatory legislation in an effort to enhance artificially the competitive position of their coal industries.[1] *But see Brown-Forman Distillers*, 476 U.S. at

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[1] Ala. Code § 37-12-5 (Supp. 1990); Ark. Stat. Ann. § 23-18-105 (Supp. 1989); Colo. Rev. Stat. § 39-22-308 (Supp. 1990); Ill. Rev. Stat. ch. 111 2/3 para. 8-403.1(g) (Supp. 1990); Ind. Code §§ 8-1-2-6.1, 8-1-2-6.6 (Supp. 1990); Ky. Rev. Stat. Ann. §§ 211.390, 211.392 (Michie Supp. 1990); Md. Tax-Gen. Code Ann. §§ 8-406, 10-704.1 (Supp. 1990); 66 Pa. Cons. Stat. Ann. § 514 (Purdon Supp. 1990); Va. Code Ann. § 58.1-433 (Supp. 1990); W. Va. Code §§ 11-13-3g, 11-13H-1 through 11-13H-3 (1987).

These statutes are reprinted in Appendix A.

580 (State "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess"). The discrimination in these statutes ranges from the establishment of quotas like Oklahoma's[2] to the granting of special tax credits to utilities that either burn in-state coal or construct facilities specially designed to burn in-state coal.[3] Every one of these

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[2] *See* Ala. Code § 37-12-5 (requiring cogenerators that burn coal to use Alabama coal); Ark. Stat. Ann. § 23-18-105 (requiring utilities to burn minimum percentage of Arkansas coal); Ill. Rev. Stat. ch. 111 2/3 para. 8-403.1(g) (requiring utilities complying with federal mandate to purchase cogenerated power to displace burning of out-of-state coal before displacing burning of Illinois coal).

[3] *See* Colo. Rev. Stat. § 39-22-308 (providing credit against state income tax for purchase of Colorado-mined coal); Ind. Code § 8-1-2-6.1 (allowing recovery of costs associated with research and development designed to increase use of Indiana coal); *id.* § 8-1-2-6.6 (allowing utility to include value of pollution facilities under construction in rate base if utility uses only Indiana coal as its primary fuel once facility is operating); Ky. Rev. Stat. Ann. § 211.390, 211.392 (tax exemption for facilities that burn Kentucky coal and use certain pollution control technology); Md. Tax-Gen. Code Ann. §§ 8-406(b), 10-704.1 (providing credits against franchise tax and state income tax for using Maryland-mined coal); 66 Pa. Cons. Stat. Ann. § 514 (preferential form of rate recovery for utilities "upgrading the capability of an existing coal fueled plant to use coal mined in Pennsylvania"); Va. Code Ann. § 58.1-433 (tax credit to cogenerators burning Virginia coal); W. Va. Code §§ 11-13-3g, 11-13H-1 through 11-13H-4 (tax credit for utilities burning coal from West Virginia mines or from mines employing at least 100 West Virginia residents). *Cf.* Utah Code Ann. § 59-7-110.5 (Supp. 1990) (providing tax credit for export of Utah-mined coal outside of United States).

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statutes burdens interstate commerce, *see New Energy Co.*, 486 U.S. at 275-77 (discriminatory tax incentives unconstitutional), and together they demonstrate that the Balkanization of the nation's coal industry is well under way. Furthermore, history demonstrates that protectionist statutes like these, if countenanced, will spread to other industries as well. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (discriminatory tax on imported liquor); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (discriminatory tax on exported natural gas); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (ban on imported milk).

The Special Master correctly concluded that the direct impact of the Oklahoma statute alone demonstrates its unconstitutionality. This conclusion becomes even more inescapable when the Oklahoma statute is examined in the context of the national energy market.

II. The Special Master Correctly Concluded That Oklahoma's Discriminatory Statute Cannot Be Justified.

"[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co.*, 486 U.S. at 274. Oklahoma bears the burden of showing

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The discriminatory effect of these types of statutes is substantial. Electricity generation facilities generally are designed to burn a specific type of coal, which greatly limits the utility's ability to shift to a different type of coal in the future.

that its discriminatory statute advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. *Id.* at 278; *see also Maine v. Taylor*, 477 U.S. 131, 138 (1986); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). This burden is a heavy one. "[T]he proffered justification for any local discrimination against interstate commerce must be subjected to 'the strictest scrutiny.' " *Taylor*, 477 U.S. at 144 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

The justifications advanced by Oklahoma for its discriminatory statute are purely economic. *See* Report at 24. Furthermore, Oklahoma does not "argue or offer to prove that the asserted purposes of the Oklahoma Act cannot be achieved by non-discriminatory means." *Id.* at 28. Therefore, the Special Master's finding that Oklahoma did not, and could not, justify its discrimination against interstate commerce is compelled by the applicable law.

Oklahoma's inability to justify its discrimination against Wyoming's low-sulfur coal is further confirmed by Congress' recent adoption of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 1991 U.S. Code Cong. & Admin. News (104 Stat.) 2399 (to be codified at 42 U.S.C. §§ 7401-7642). Congress recognized that sulfur dioxide emissions from coal-fired power plants constitute one of the most serious sources of air pollution in the country,[4] and expressly targeted electric power plants in an effort "to reduce the adverse effects of acid deposition

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[4] Power plants account for approximately two-thirds of the country's total sulfur dioxide emissions. *See* H.R. Rep. No. 101-490, 101st Cong., 2d Sess., pt. 1, at 357 (1990); S. Rep. No. 101-228, 101st Cong., 2d Sess. 282 (1989).

through reductions in annual emissions of sulfur dioxide . . . . " Clean Air Act § 401(b), 104 Stat. 2585. Specifically, the legislation mandates that affected power plants reduce their emissions rate of sulfur dioxide to 2.5 pounds of sulfur dioxide per million British thermal units ("Btu") of heat input by January 1, 1995, and to 1.2 pounds of sulfur dioxide per million Btu by January 1, 2000. *Id.* §§ 404, 405, 104 Stat. 2592-2613. Thereafter, total aggregate emissions of sulfur dioxide from coal-fired power plants are capped to maintain those reductions on a nation-wide basis. *Id.* § 403(a), 104 Stat. 2589.

By forcing Oklahoma's utilities, against their wishes, to replace low-sulfur Wyoming coal with high-sulfur Oklahoma coal, Oklahoma's statute directly interferes with Congress' express legislative objectives.[5] *See* Flaim & Hemphill at 18-21. While this may provide economic benefit to Oklahoma's miners, it cannot benefit the health of Oklahoma's citizens and hinders the national effort "to protect and enhance the quality of the nation's air resources." Clean Air Act, as amended, § 101(b)(1), 42 U.S.C. § 7401(b)(1) (1988). At a time when Congress has committed the nation to renewed and intensified efforts

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[5] The annual average sulfur dioxide emission rate of Wyoming coal is 0.92 pounds of sulfur dioxide per million British thermal units ("Btu"), compared to 4.63 pounds of sulfur dioxide per million Btu of Oklahoma coal. *See* National Coal Association, *Steam Electric Plant Factors* at I-12, 13 (1987). *See also* SF ¶¶ 24-26. Although the Clean Air Act's emissions limitations can be met by adding scrubbers and other control technology, forcibly curtailing the utilities' use of clean coal hinders the utilities' ability to benefit from the Act's emission allowance allocation and transfer system. *See infra* Part III.

to reduce air pollution, Oklahoma's "Buy [Dirty] Oklahoma [Coal]" Act (like its counterparts in other states) stands out as an anachronistic example of a local barrier to the achievement of important national objectives.

III. The Oklahoma Statute Must Be Stricken In Its Entirety.

Oklahoma argued, and the Special Master agreed, that because the Grand River Dam Authority ("GRDA") is a state-owned facility, Oklahoma is free to compel it to purchase Oklahoma-mined coal under the "market participant doctrine." The Association joins in Wyoming's argument that while the Oklahoma legislature is free to adopt a statute applicable only to the GRDA, the Special Master's recommendation that this Court effectively rewrite the statute to achieve this result is in error.

The statute requires *"all entities* providing electric power for sale to the consumer in Oklahoma and generating said power from coal-fired plants located in Oklahoma" to burn a mixture of coal that contains at least ten percent Oklahoma-mined coal. Okla. Stat. tit. 45, § 939 (Supp. 1991) (emphasis added). Clearly, this statute is not susceptible to any construction that would limit its application to the GRDA. Amendment of the phrase "all entities" to read "the GRDA" or "state-owned utilities" must be done, if at all, by the Oklahoma legislature. *See, e.g.*, Mo. Ann. Stat. § 34.080 (Vernon 1969) (expressly requiring all state agencies to purchase Missouri coal if it is available at a competitive price).

The severability clause applicable to the Oklahoma statute is of no consequence here because no part or

provision of the statute is sufficiently independent of the remainder of the Act to permit separation. *See Baldwin v. Franks*, 120 U.S. 678, 688 (1887). The severability clause provides as follows:

> The provisions of this act are severable and if any part or provision shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Act of March 26, 1986, ch. 43, 1986 Okla. Sess. Laws 74. By its very terms, this clause presupposes that a discrete and separable portion of the law is unconstitutional, and that such a portion may be excised from the remaining valid portions of the Act. That clearly is not the case here: the statute applies to "all entities," and there is nothing that can be removed from that phrase to limit its application to state-owned utilities.

Furthermore, this Court should not presume that the Oklahoma legislature would, if given the opportunity today, adopt a statute applicable only to the GRDA. The Clean Air Act Amendments will have far-reaching consequences for state-owned as well as privately-owned utilities that the Oklahoma legislature would no doubt wish to consider before making such a policy decision. Under the amended Clean Air Act, utilities receive a limited number of "pollution allowances," each allowance entitling it to emit one ton of sulphur dioxide in a calendar year. Clean Air Act § 402(3), 104 Stat. 2585. Allowances are transferable and are likely to be of great value. By requiring the GRDA to burn high-sulphur coal, the Oklahoma statute greatly limits the GRDA's flexibility under this scheme, jeopardizing its ability to offer competitive

rates to its consumers. Thus, despite the usual presumption in favor of severability relied upon by the Special Master, *see* Report at 33 (citing *Williams v. Oklahoma*, 542 P.2d 554, 595-96 (Okla. Crim. App. 1975), *judgment vacated on other grounds*, 428 U.S. 907 (1976); *Englebrecht v. Day*, 208 P.2d 538, 544 (Okla. 1949)), the doctrine of severability has no application to this case and the Oklahoma statute must be ruled on as written.

CONCLUSION

Oklahoma's blatantly discriminatory statute has no legitimate purpose, and represents but one component of a broad patchwork of protectionist state legislation which threatens to disrupt the highly-efficient national coal market and thwart the objectives of the Clean Air Act. The principles of federalism embodied in the Commerce Clause demand that Oklahoma's statute be declared unconstitutional *in toto*.

Dated: April 2, 1991

Respectfully submitted,

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APPENDIX A

Alabama

Ala. Code § 37-12-5 (Supp. 1990)

Purchase of coal produced in Alabama required.

. . . [A] cogenerator who uses coal as a fuel source to produce electrical power shall purchase coal produced in the state of Alabama provided that such Alabama coal is available to the cogenerator at prices and under terms and conditions (including availability, quantity, quality and reliability of supplier) at least as favorable as coal produced outside the state of Alabama.

Arkansas

Ark. Stat. Ann. § 23-18-105 (Supp. 1989)

Use of Arkansas-mined coal.

(a) To the extent that it is technically, economically, and environmentally feasible, all electric utilities in Arkansas providing electric power for sale to consumers in Arkansas and generating electric power from coal-fired plants located in Arkansas shall burn a mixture of coal that contains a minimum of:

(1) Three percent (3%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis from January 1, 1988, until December 31, 1988;

(2) Six percent (6%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis from January 1, 1989, until December 31, 1989; and

(3) Ten percent (10%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis each calendar year after January 1, 1990.

(b)(1)(A) No electric utility shall be required to comply with this section if to do so would result in increasing the cost of electricity to its consumers over the cost incurred to serve them under existing or alternative coal purchase arrangements.

(B) Types of increased costs to be considered in addition to the cost of the coal include, but are not limited to. . . .

* * *

(2) No public utility shall be required to comply with this section if to do so would result in the utility exceeding any of its state or federal air quality emission standards or any other conditions of its environmental permits.

(3) No public utility shall be required to comply with the provisions of this section if to do so would result in the utility being unable to fulfill any existing contractual commitments for the purchase of coal or result in the purchase of a quantity of Arkansas coal above the amount the utility can utilize.

* * *

Colorado

Colo. Rev. stat. § 39-22-308 (Supp. 1990)

Credit allowed for purchase of Colorado coal.

(1) For income tax years commencing on or after January 1, 1989, but prior to January 1, 1995, there shall

be allowed, as a credit against any taxes imposed on income by this part 3, an amount equal to one dollar per ton for each ton of Colorado coal purchased by and delivered to the taxpayer in excess of the number of tons of Colorado coal purchased by and delivered to the taxpayer in the income tax year commencing on or after January 1, 1988. If the amount of the tax credit allowed by this section exceeds the amount of income tax due for the taxable year, the excess amount may be carried forward as a credit against subsequent years' income tax liability for a period not exceeding three years and shall be applied first to the earliest income tax years possible. For purposes of this section, Colorado coal means coal mined in Colorado, as certified by the producer of such coal.

(2)(a) Any public or private corporate purchaser who is not liable for or subject to state income tax during the year the coal is purchased and who is otherwise eligible for the credit allowed by subsection (1) of this section may by written agreement transfer such credit to the producer of the coal. Said producer shall be allowed, as a credit against any taxes imposed on income by this part 3, an amount equal to the amount of credit for which the purchaser would otherwise have been eligible pursuant to subsection (1) of this section. Any such credit shall be subject to any limitations established in subsection (1) of this section. Said producer shall reduce the purchase price of said coal to such corporate purchaser by the amount of the credit so transferred. . . .

Illinois

Ill. Rev. Stat. ch. 111 2/3 para. 8-403.1(g) (Supp. 1990)

Electric utilities – Purchase of electricity from qualified solid waste energy facilities.

(g) The Illinois Commerce Commission shall require that: (1) electric utilities use the electricity purchased from a qualified solid waste energy facility to displace electricity generated from nuclear power or coal mined and purchased outside the boundaries of the State of Illinois before displacing electricity generated from coal mined and purchased within the State of Illinois, to the extent possible, and (2) electric utilities report annually to the Commission on the extent of such displacements.

Indiana

Ind. Code §§ 8-1-2-6.1(c), 8-1-2-6.6(b) (Supp. 1990)

Clean coal technology - Definitions - Recoverable expenses.

(c) Except as provide in subsection (d), the commission shall allow a utility to recover as operating expenses those expenses associated with:

(1) Research and development designed to increase use of Indiana coal; and

(2) Preconstruction costs (including design and engineering costs) associated with employing clean coal technology at a new or existing coal burning electric generating facility if the commission finds that the facility:

(A) Utilizes and will continue to utilize (as its primary fuel source) Indiana coal; or

(B) Is justified, because of economic considerations or governmental requirements, in utilizing non-Indiana coal; after the technology is in place.

§ 8-1-2-6.6(b) Qualified pollution control property – Addition of value for ratemaking purposes.

(b) Upon the request of a utility that began construction after October 1, 1985, of qualified pollution control property that is to be used and useful for the public convenience, the commission shall for ratemaking purposes add to the value of that utility's property the value of the qualified pollution control property under construction, but only if at the time of the application and thereafter:

(1) The facility burns only Indiana coal as its primary fuel source once the air pollution control device is fully operational; or

(2) The utility can prove to the commission that the utility is justified because of economic considerations or governmental requirements in utilizing some non-Indiana coal.

Kentucky

Ky. Rev. Stat. Ann. §§ 211.390, 211.392 (Michie Supp. 1990)

Definitions for KRS 211.392.

(1) "Fluidized bed energy production facility" shall mean any facility or property, located in this state, which is fueled by Kentucky coal. . . .

§ 211.392. Fluidized bed combustion technology tax exemption certificate.

* * *

(9) The fluidized bed combustion technology tax exemption certificate, upon approval, shall exempt the facilities from taxes outlined in the provision of this section and KRS Chapters 132, 136, 138, and 139. . . .

Maryland

Md. Tax-Gen. Code Ann. §§ 8-406(b), 10-704.1 (Supp. 1990)

§ 8-406(b) Credits.

(b) Maryland-mined coal. – A public service company, including any multijurisdictional public service company, may claim a credit against the public service company franchise tax in the amount of $3 for each ton of Maryland-mined coal that the public service company purchased in the calendar year in excess of the number of tons of Maryland-mined coal that the public service company purchased in 1986.

§ 10-704.1 For purchase of Maryland-mined coal.

(b) Amount of credit generally. – A cogenerator that is not subject to the public service company franchise tax may claim a credit against the State income tax in the amount of $3 for each ton of Maryland-mined coal that the cogenerator purchased in the taxable year in excess of the number of tons of Maryland-mined coal that the cogenerator purchased in calendar year 1986.

Missouri

Mo. Stat. Ann. § 34.080 (Vernon 1969)

1. That the board of trustees or other officer or officers in charge of every institution in the state of

Missouri which is supported in whole or in part by public funds, and who are required to purchase coal for fuel purposes in the operation of any such institution, shall be required to purchase and use coal which is mined in the state of Missouri, if the cost of the coal mined in the state of Missouri is not greater than the cost of coal mined in any other state or states, including the cost of transportation.

2. The term "institution" shall be construed to include all institutions supported by public funds of the state, but shall not include municipal corporation, political subdivisions or public schools.

Pennsylvania

66 Pa. Cons. Stat. Ann. § 514 (Purdon Supp. 1990)

Use of coal.

(c) Cost of upratings . . . [T]he commission may allow a portion of the prudently incurred costs, determined on a per megawatt basis and not to exceed 50% of the unit's undepreciated original cost per megawatt, of uprating the capability of an existing coal-fueled plant to use coal mined in Pennsylvania to be made a part of the rate base or otherwise included in the rates charged by the utility before such uprating is completed. . . .

Virginia

Va. Code Ann. § 58.1-433 (Supp. 1990)

Qualifying cogenerators and small power producers credit.

A. For all taxable years beginning on and after January 1, 1988, every cogenerator . . . shall be allowed a credit against the tax imposed by § 58.1-400 in the following amount: one dollar per ton for each ton of coal mined in Virginia, purchased by any cogenerator which sells electric power to a public service corporation in Virginia.

B. For all taxable years beginning on and after January 1, 1989, every cogenerator . . . shall be allowed an additional credit against the tax imposed by § 58.1-400 in the following amount: one dollar per ton for each ton of coal mined in Virginia, purchased by any cogenerator which sells electric power to a public service corporation in Virginia.

* * *

West Virginia

W. Va. Code §§ 11-13-3g, 11-13H-I through 11-13H-3 (1987)

§ 11-13-3g. Tax credit for increased generation of electricity from coal.

(a) There shall be allowed as a credit against the tax imposed by section two of this article, on the privilege taxable under section two-m of this article, the amount determined under article thirteen-h of this chapter, providing a credit for increased generation of electricity at electric power plants in this state which burn coal produced by miners who are residents of this state.

* * *

§ 11-13H-1. Legislative finding.

The Legislature finds that electricity generated in this state is by and large generated from coal; that this state and this region are blessed with large quantities of minable coal that is suitable for use as fuel to generate electricity; that there are sound economic purposes to locating electric power generating facilities in the coal fields and to encouraging power companies to operate such plants at their most cost-effective level; and that many West Virginia miners work in mines located in other states and live or reside in this state. Therefore, encouraging greater utilization of existing power plants and their use of coal produced by West Virginia miners at mines located in this or other states, is in the public interest and promotes the general welfare of the people of this state, in that it will increase employment opportunities for West Virginia residents.

§ 11-13H-2. Definitions.

* * *

(2) Eligible coal. – The term "eligible coal" means coal produced from an eligible mine, as defined in subsection (3).

(3) Eligible mine. – The term "eligible mine" means any mine located in this state and any mine which employs at least one hundred West Virginia residents (as defined for personal income taxes in section seven, article twenty-one of this chapter) located in another state.

* * *

§ 11-13H-3. Credit allowed; amount of credit; effective date.

(a) An electric power company that generates electricity at a power plant located in this state, that uses coal as its primary source of fuel to generate such electricity, shall be allowed a credit, as determined under subsection (b) of this section, against its liability for tax under section two-m, article thirteen of this chapter, if the taxpayer increases the amount of electricity it generates in this state, consuming coal produced from an eligible mine that employs miners who are residents of this state.

(b) Amount of credit. – The credit allowed by this section is an amount equal to the amount determined by. . . .

* * *

Utah

Utah Code Ann. § 59-7-110.5 (Supp. 1990).

Utah steam coal tax credit.

(1) For taxable years beginning on or after January 1, 1990, there is allowed, as a credit against any taxes imposed by this chapter or Chapter 8, an amount equal to $1 per ton for each ton of Utah steam coal sold from a permitted mine by the taxpayer to a purchaser outside of the United States in excess of the number of tons of Utah steam coal sold from a permitted mine by the taxpayer to a purchaser outside of the United States in the taxable year beginning on or after January 1, 1989.

(2) For purposes of this section, "Utah steam coal" means coal mined in Utah, as certified by the producer of such coal.

(3) The credit allowed by this section is repealed effective for tax years beginning on or after January 1, 1993.

(SEAL)

APPENDIX B

LETTERS OF CONSENT

ROBERT H. HENRY

ATTORNEY GENERAL
STATE OF OKLAHOMA

March 29, 1991

Lawrence J. Wolfe
Holland & Hart
Attorneys at Law
P.O. Box 1347
Cheyenne, WY 82000-1347

Re: *Wyoming v. Oklahoma,* United States Supreme Court No 112, Original

Dear Mr. Wolfe:

I am writing to inform you that the State of Oklahoma has no objection to your firm filing an amicus curiae brief, in the above-referenced cause, on behalf of the Wyoming Mining Association.

Sincerely,

/s/ Neal Leader
NEAL LEADER
ASSISTANT ATTORNEY GENERAL
CHIEF, CIVIL DIVISION

NL/vid/wolfe

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OKLAHOMA CITY, OKLAHOMA 73105
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THE STATE [SEAL] OF WYOMING

ATTORNEY GENERAL

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MIKE SULLIVAN
GOVERNOR

JOSEPH B. MEYER
ATTORNEY GENERAL

* * *

Lawrence J. Wolfe
HOLLAND & HART
P.O. Box 1347
Cheyenne, WY 82003-1347

RE: Amicus Curiae Brief
for Wyoming Mining Association
Wyoming v. Oklahoma, Docket No. 112

Dear Mr. Wolfe:

This is to inform you that the State of Wyoming consents to the filing of an amicus curiae brief by your client, the Wyoming Mining Association, to be submitted in the above referenced original action before the United States Supreme Court, for the purpose of supporting and excepting to the Special Master's Report. As you may know, our brief is due on April 2, 1991. We would anticipate that the Wyoming Mining Association brief should be filed on the same day.

Please let me know it I can be of any further assistance.

Sincerely,

/s/ Steve Jones
Steve Jones
Senior Assistant
Attorney General

SCJ/bg

1890-1990
WYOMING
CENTENNIAL
A LASTING LEGACY

Supreme Court, U.S.
FILED
APR 2 1991
OFFICE OF THE CLERK

(11)

No. 112, Original

In The Supreme Court
Of The United States

October Term, 1987

STATE OF WYOMING,
Plaintiff,
vs.
STATE OF OKLAHOMA,
Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED JUNE 29, 1990

CORRECTED EXCEPTIONS OF THE STATE OF WYOMING TO THE REPORT OF THE SPECIAL MASTER

JOSEPH B. MEYER
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Counsel of Record

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123 Capitol Building
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March, 1991

Exceptions of the State of Wyoming

The State of Wyoming excepts to the Special Master's Report dated June 29, 1990, as follows:

EXCEPTION NO. 1

The State of Wyoming excepts to the Special Master's recommendation that Wyoming's claim as to the Grand River Dam Authority be dismissed without prejudice.

EXCEPTION NO. 2

The State of Wyoming excepts to the Special Master's finding that the Act of March 26, 1986, Chapter 43, 1986 Okla. Laws 74, is severable and is, therefore, constitutional as applied to state-owned utilities.

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No. 112, Original

In The Supreme Court
Of The United States

October Term, 1987

STATE OF WYOMING,
Plaintiff,
vs.
STATE OF OKLAHOMA,
Defendant.

CORRECTED BRIEF FOR THE STATE OF WYOMING IN SUPPORT OF EXCEPTIONS

OPINION BELOW

The Report of the Special Master was filed on June 29, 1990.

JURISDICTION

The Court has original and exclusive jurisdiction pursuant to article III, § 2, cl. 2, of the United States Constitution and 28 U.S.C. 1251(a)(1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
article I, § 8, cl. 3

> The congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

OKLA. STAT., tit. 45, § 939 (Supp. 1986)
Coal-fired electric generating plants - Burning Oklahoma Coal.

All entities providing electric power for sale to the consumer in Oklahoma and generating said power from coal-fired plants located in Oklahoma shall burn a mixture of coal that contains a minimum of ten percent (10%) Oklahoma mined coal, as calculated on a BTU ("British Thermal Unit") basis.

OKLA. STAT., tit. 45, § 939.1 (Supp. 1986)
Cost increases to consumers and impairment of certain contracts prohibited.

The cost to the entity shall not increase cost to the consumer or exceed the energy cost of existing long-term contracts for out-of-state coal preference including preference given Oklahoma vendors as provided in Section 85.32 of Title 74 of the Oklahoma statutes.

STATEMENT OF THE CASE

A. *Introduction.*

This case concerns the State of Wyoming's challenge to an Oklahoma statute (the Oklahoma Act) which interferes with the interstate sale of coal produced in Wyoming.

On June 30, 1988, the Court granted the State of Wyoming leave to file its complaint for an original action, over Oklahoma's objections. *State of Wyoming, Plaintiff, v. State of Oklahoma, Defendant,* No. 112, 487 U.S. 1231 (1988). Oklahoma subsequently filed a motion to dismiss challenging Wyoming's standing to file its complaint. The Court denied the motion and permitted Oklahoma to file an

answer. *State of Wyoming, Plaintiff, v. State of Oklahoma, Defendant,* No. 112, 488 U.S. 921 (1988). The Court appointed the Honorable Philip W. Tone as Special Master. *State of Wyoming, Plaintiff, v. State of Oklahoma, Defendant,* No. 112, ____ U.S. ____, 109 S.Ct. 1334 (1989).

Both parties filed motions for summary judgment, which were accompanied by a Stipulation of Facts, affidavits and other supporting material. The Special Master granted Wyoming's motion for summary judgment; he determined that Wyoming had standing to bring the action and that so far as privately owned electrical utilities were concerned, the Oklahoma statute violated the Commerce Clause. The Master decided that the the statute, as applied to a state owned utility, was valid. Report of Special Master, p. 34. The Report of the Special Master was received and ordered filed by the Court. *State of Wyoming, Plaintiff v. State of Oklahoma, Defendant,* No. 112, ____ U.S. ____, 111 S.Ct. 31 (1990).

After the Special Master filed his report, the parties were satisfied with the conclusions and recommended decision. Instead of taking exceptions to the report, the parties agreed to a proposed order which was submitted to the Master. The Court rejected that approach and advised the parties by letter dated January 22, 1991, that it would not be proper to enter the proposed decree, because "it adjudicates, without briefing and oral argument the constitutionality of the Oklahoma statute at issue in this case." The Court further suggested that the parties could resolve the case by an agreement that the Oklahoma statute would not be applied and that the case would be dismissed.

Because other states have adopted or are considering similar protectionist legislation, the State of Wyoming

desires to have a final adjudication on the constitutionality of the statute. Consequently, Wyoming requested a briefing schedule, which the Court set. *State of Wyoming, Plaintiff v. State of Oklahoma, Defendant,* No. 112, ____ U.S. ____, 111 S.Ct. 1100 (1991). While Wyoming agrees with the Special Master's recommendation that the Oklahoma law be found unconstitutional, it disagrees with his decision that the statute is valid as applied to state owned utilities.

B. *Impact of the Oklahoma Act on the State of Wyoming.*

OKLA. STAT., tit. 45, § 939 (Supp. 1986) (the Oklahoma Act) requires that Oklahoma coal fired electrical generating utilities purchase at least 10% of their coal from mines within Oklahoma.

Much of the coal consumed in this country is mined in Wyoming. In 1988, Wyoming was the nation's leading coal producer. (Stipulation, para. 29; Appendix, A-18).[1] Coal production in Wyoming has dramatically increased in the last five years. In 1983, 107,902,764 tons were mined. In 1988, 163,815,884 tons of coal were removed. Estimates based on first quarter production were that 160,789,628 tons would be extracted in 1989. (Stipulation, para. 7; Appendix, A-5).[2]

---

1. Virtually all of the salient facts were agreed to by the parties in a Stipulation of Facts which was prepared for both states' motions for summary judgment. The references are to that Stipulation, which is attached as an Appendix. The Master's recommended findings of fact were based on the Stipulation and unrebutted submissions. Master's Report, pp. 2-10.

2. Wyoming continues to lead the nation in coal production. During 1990, 185,762,000 tons were mined in Wyoming, an increase of 8.3%. Energy Information Administration, *Weekly Coal Production,* DOE/EIA-0218 (91-03) at 4 (1991).

Wyoming exports coal to nineteen other states, including Oklahoma. (Stipulation, para. 27; Appendix, A-18). Use of coal within Wyoming in 1988 constituted only 14.6% of the total tonnage of coal sold by Wyoming producers. (Stipulation, Exhibit 4). Eight percent of the coal produced from Wyoming coal mines in 1988 was shipped to Oklahoma. (Stipulation, Exhibit 4). Oklahoma is the third largest importer of Wyoming coal. (Stipulation, Exhibit 4). From 1981 through 1986, four Oklahoma electric utilities, which operate ten coal-fired plants, purchased nearly 100% of their coal from Wyoming mines.[3]

The four Oklahoma electric uilities that are subject to the Act are the Grand River Dam Authority, Oklahoma Gas and Electric, Public Service of Oklahoma and Western Farmers' Electrical Cooperative. (Stipulation, para. 8; Appendix, A-5). Only one of the ten plants is equipped with scrubbers to allow the burning of high sulfur coal. (Stipulation, para. 8; Appendix, A-5).

Since 1980, eight companies have shipped Wyoming coal into Oklahoma. (Stipulation, para. 9; Appendix, A-6). These companies are: Kerr-McGee, Mobil Coal Production Inc., Rochelle Coal Company (subsidiary of Peabody Coal Co.), Triton Coal company (subsidiary of Shell Mining), Exxon Coal USA, Amax Mining, Thunder Basin Coal Company (subsidiary of ARCO), and NERCO. The mines of all these companies are located in the Powder River Basin of Wyoming.

The State of Wyoming imposes a severance tax on the extraction of coal. WYO. STAT. §§ 39-6-301 to 39-6-307

3. Special Master's Report, p. 6; Energy Information Administration, DOE/EIA-0125(86/4Q), *Coal Distribution*, January-December, 1986 (1987).

(1977). Because severance taxes are calculated as a percentage of the sales price of coal, the amount of severance taxes collected depends directly on the sale of Wyoming coal by Wyoming producers. The severance tax is used to finance various state and local governmental functions in Wyoming. (Stipulation, para. 6; Appendix A-4). Consequently, a reduction in coal severance tax payments has a significant effect on Wyoming's state and local revenues. An ad valorem tax is also imposed on coal. WYO. STAT. §§ 39-2-201 to 39-2-202 (1977). The ad valorem tax is used to finance various local governmental functions, as set out in WYO. STAT. § 39-2-402(b).[4]

Wyoming also has another source of revenue from coal production. Under the provisions of the Mineral Leasing Act, 30 U.S.C. §§ 181, 191 (1983), Wyoming receives 50% of the royalties paid on coal which is mined on federal lands. Approximately 52% of the land in Wyoming is federally owned.[5] In 1986, Wyoming received $28,486,778 in coal royalties from production on federal lands located in Wyoming. In 1987, that figure was $60,894,526.[6] These funds are used for state and local government purposes as set out in WYO. STAT. § 9-4-601 (Cum. Supp. 1989).

4. The Oklahoma Act has had a significant effect on the payment of severance and ad valorem taxes. The Director of the Minerals Tax Division, Wyoming Department of Revenue and Taxation, has estimated that Wyoming lost $535,886.00 in severance taxes for 1987, $542,352.00 for 1988, and $87,130.00 from January-April, 1989, for a total of $1,165,398.00. Affidavit of Richard J. Marble, at 3., Appendix to Motion of the State of Wyoming for Summary Judgment.

5. U.S. General Accounting Office, *Alternatives for Achieving Greater Equities in Federal Land Payment Programs*, PAD 79-64, Washington, D.C., September 25, 1979.

6. U.S. Department of the Interior, *Minerals Management Service, Mineral Revenues: The 1987 Report on Receipts from Federal and Indian Leases*, (October 1988).

C. *Special Master's Conclusion*

The Report of Special Master dated June 29, 1990, contained these conclusions:

1. Wyoming should be held to have standing to bring this action.

2. Wyoming's motion for summary judgment should be granted and declaratory and injunctive relief should issue with respect to the Act as it applies to Oklahoma Gas and Electric Company, Public Service Company of Oklahoma, and Oklahoma and Western Farmers Electric Cooperative, the privately owned utilities, on the ground that the Act is unconstitutional under the Commerce Clause. As to Grand River Dam Authority, the action should be dismissed without prejudice to its right to assert its claim in an appropriate forum; alternatively, the Act should be held valid insofar as it applies to the Grand River Dam Authority.

3. Oklahoma's motion for summary judgment should be denied.

Special Master's Report, p. 34.

The State of Wyoming fully supports the Special Master's recommendations, except for the limited exceptions identified in this brief.

SUMMARY OF THE ARGUMENT

The Special Master recommended that the United States Supreme Court not exercise jurisdiction over this matter with respect to Wyoming's claim against the Grand River Dam Authority. According to the Special Master, the Oklahoma law could constitutionally regulate the Grand River Dam Authority under the market participant doctrine and, therefore, did not violate the Commerce Clause of the United States Constitution. He reasoned that a determination concerning severability of the statute must first be made at the state court level. Because the severability of the statute had not been ruled on by Oklahoma courts and because the United States Supreme Court usually defers to state courts on such questions, the Special Master reasoned that Oklahoma courts must first have an opportunity to rule on the question.

Wyoming takes exception to this view. In the context of an exclusive, original action before the United States Supreme Court, it would be improper to remand a matter to a state supreme court when the matter is properly before the United States Supreme Court.

The United States Supreme Court must exercise jurisdiction over Wyoming's claim that Oklahoma cannot require the Grand River Dam Authority to burn Oklahoma produced coal. The statute in question does not contain separate portions, one which is applicable to privately owned utilities and another to publicly owned utilities. It is one statute which must be applied to all utilities uniformly. To find the statute constitutional would mean that the Court has judicially legislated an amendment to the statute, with the result that the general phrase "all entities" is deleted and the phrase "all state owned utilities" is inserted. The

concept of severability does not extend so far as to allow such judicial reinterpretation.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE OKLAHOMA ACT CANNOT BE SAVED BY APPLYING THE SEVERABILITY DOCTRINE.

In an alternative recommendation, the Special Master took the position that, because the Grand River Dam Authority is a state owned utility, it could be compelled to comply with the terms of the Oklahoma Act under the market participant doctrine. Wyoming does not dispute that Oklahoma's legislature could write a constitutional statute applying only to the Grand River Dam Authority, but it is only the legislature that may exercise such authority. The doctrine of severability cannot be used to rewrite the statute.

The Oklahoma Act states quite clearly that "all entities providing electric power for sale to the consumer in Oklahoma and generating said power from coal fired plants located in Oklahoma" must purchase at least ten percent (10%) Oklahoma mined coal for its generators to burn. OKLA. STAT., tit. 45, § 939 (Supp. 1986). It is true that courts will regularly construe statutes in a manner that renders them constitutional, but there are limits to such endeavors.

The Oklahoma Act cannot be found to be constitutional, unless it is judicially rewritten. The Oklahoma legislature clearly stated its intent that the Act would apply to "all entities." Changing this express language to read "the Grand River Dam Authority" requires more than mere con-

struction and must be done, if at all, only by the Oklahoma legislature.

A statute is deemed to be severable if, after an invalid portion of it has been stricken, the remaining provisions are found to be self-sustaining and capable of separate enforcement without regard to the stricken portion. 2 *Sutherland Statutory Construction*, § 44.04 (C. Sands 4th ed. 1973). If a statute is severable, it may be saved constitutionally. But if a statute must be rewritten to be saved, it is not capable of being severed and, therefore, must fall. This principle was first articulated in *United States v. Reese*, 2 Otto 214, 92 U.S. 214, 221 (1875).

As Justice Oliver Wendell Holmes explained in *United States v. Ju Toy*, 198 U.S. 253, 262 (1905), a statute "must be valid as to all that it embraces, or altogether void." If the words of a statute are of a general nature, it cannot be rewritten so as to apply only to a narrower class in order to save its constitutionality. This is not, as Justice Holmes might observe "saving what remains," but rather is judicial legislation.

Legislatures may fashion severability clauses which provide that if application of a statute to some classes is found unconstitutional, severability of those classes permits application of the act to other acceptable classes. This acceptable type of severability clause was described in *I.N.S. v. Chadha*, 462 U.S. 919, 931-932 (1983):

> If any particular provision of this act, or any application thereof to any person or circumstance, is held invalid, the remainder of the act and the application of such provision to other persons or circumstances shall not be affected thereby.

If the Oklahoma legislature had written its severability clause as Congress wrote the severability clause in *Chadha*, there would be no problem.

By contrast, the Oklahoma legislature only prescribed that unconstitutional portions of the statute were to be severed:

> The provisions of this act are severable and if any part or provision shall be held void, the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Act of March 26, 1986, Ch. 43, 1986 Okla. Laws 74.

There was no intention expressed by the Oklahoma legislature to sever the applicability of the Oklahoma Act, even though this could have been easily done, using the language approved in *I.N.S. v. Chadha*, 462 U.S. at 931-932. The Special Master's recommendation that the Act be rewritten so that it applies only to the Grand River Dam Authority is not supported by the Act's severability clause. Neither is the recommendation supported by Oklahoma law.

The Oklahoma cases relied upon by the Special Master do not contradict the basic principle that rewriting a statutory provision goes beyond the concept of severability and cannot be condoned by the courts. The Special Master's holding that severability was proper is not correct under decisions of this Court or the Supreme Court of Oklahoma. *Englebrecht v. Day*, 208 P.2d 538, 544 (1949); *Williams v. Oklahoma*, 542 P.2d 554, 595-96 (Okla. 1975), *rev'd.* on other grounds, 428 U.S. 907 (1975); *Grand River Dam Authority v. Oklahoma*, 645 P.2d 1011, 1018 (Okla. 1982), and *Udall v. Udall*, 613 P.2d 742, 745 (Okla. 1980).

The Oklahoma Supreme Court has taken a conservative approach to judicial tampering with statutes. *Udall v. Udall*, 613 P.2d at 745. Because the Oklahoma Act has universal applicability, it is apparent that the Oklahoma Supreme Court would not undertake the task of reading in an exception to the applicability of the statute for all privately held electric utilities. *Seventeen Hundred Peoria, Inc., v. City of Tulsa*, 422 P.2d 840, 843 (Okla. 1966). An amendment of a law by judicial construction is something the Oklahoma Supreme Court has refused to do. *City of Bristow ex rel. Hedges v. Groom*, 151 P.2d 936, 940 (1944).

The Oklahoma Act has no independent clauses or sections that can be excised from the remainder of the offending statute. The Act applies to "all entities"; there is nothing that can be removed from that phrase to limit its applications to state owned utilities. Therefore, no portion of the Act can be saved. The severability clause in the Act is of no consequence under these circumstances, because no part of the Act is sufficiently independent from the remainder of the Act to warrant separation. Nothing would remain after the unconstitutional provisions are stricken.

II. THE COURT SHOULD DECIDE WHETHER THE OKLAHOMA STATUTE, WHICH MANDATES THE USE OF OKLAHOMA COAL, CAN BE APPLIED TO A STATE OWNED ELECTRICAL GENERATING FACILITY.

The Special Master has recommended that, as to the Grand River Dam Authority, the action be dismissed without prejudice to Wyoming's right to assert its claim "in an appropriate forum." While it is true that the United States Supreme Court may defer to the judgments of state courts on the question of severability of state statutes, such defer-

ence is not mandatory. This Court has decided such issues in appropriate cases. *Champlin Refining Co. v. Corporation Comm. of Oklahoma,* 286 U.S. 210, 238 (1932); *Dorchy v. Kansas,* 264 U.S. 286, 291 (1924); *Guinn v. United States,* 238 U.S. 347, 366 (1915); and *Myers v. Anderson,* 238 U.S. 368, 381 (1915).

This issue appears to be one of first impression because the Court has not had the issue of severability of a state statute before it, in the context of an exclusive, original action. Because this is an original action, there is no lower tribunal to which the matter can be remanded. This Court should decide, based upon whatever Oklahoma law on the issue of severability is available, Wyoming's claim that the statute is unconstitutional and cannot be severed in its application.

The Special Master cites *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 624 (1985) and *Zobel v. Williams,* 457 U.S. 55, 64-65 (1982), for the proposition that state courts must resolve issues of severability of state statutes. While the Court found in those cases that it was appropriate to remand the issue of severability to the state courts for resolution, an exclusive, original action cannot be remanded to any other forum for further determination. Therefore, dismissal without prejudice is not a justifiable alternative. Rather, the issue must be addressed by this Court.

The framers of the United States Constitution must have contemplated that requiring a state to bring an action against another state, in that latter forum state, was inherently unfair. They determined that the only fair tribunal to hear disputes between states was the United States Supreme Court. A. Hamilton, *The Federalist* No. 80 (1788);

L. Tribe, *American Constitutional Law,* fn. 4, at 43 (2d ed. 1988).

To require Wyoming to ask Oklahoma courts to rule on the nature of the severability of its own state statute would be inherently unfair and prejudicial to Wyoming. The United States Supreme Court is an impartial forum and the one which must resolve this dispute.

CONCLUSION

Instead of entering judgment with respect to only the three privately owned utilities in Oklahoma or attempting to judicially rewrite the Act so that it applies only to the Grand River Dam Authority, this Court should declare that the entire Act is unconstitutional on its face and is therefore invalid.

Respectfully submitted,

JOSEPH B. MEYER
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March, 1991

No. 112, Original

In The Supreme Court

Of The United States

October Term, 1987

STATE OF WYOMING,
Plaintiff,
vs.
STATE OF OKLAHOMA,
Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED JUNE 29, 1990

APPENDIX TO
EXCEPTIONS OF THE STATE OF WYOMING
TO THE REPORT OF THE SPECIAL MASTER

No. 112, Original

In The Supreme Court
Of The United States

October Term, 1987

STATE OF WYOMING,
Plaintiff,
vs.
STATE OF OKLAHOMA,
Defendant.

STIPULATION OF THE FACTS

COME NOW the parties in the above-entitled matter, the State of Wyoming and the State of Oklahoma, and hereby stipulate that the following facts are agreed upon as between the parties in this litigation. This stipulation does not constitute an admission by either party that the facts set forth herein are relevant or material to this litigation. Stipulations relating to statutes of the respective parties refer to the statutes and the statutory language as of the date of these stipulations. The stipulations are as follows:

1. On March 26, 1986, the Oklahoma legislature passed S.B. No. 458, which has been codified as OKLA. STAT. title 45, Sections 939 and 939.1 (Supp. 1986) (hereinafter referred to as "the Act"). It became effective in Oklahoma on January 1, 1987.

2. The Oklahoma legislature passed the following resolutions on the following dates:

a. Senate Resolution No. 21, 40th leg., passed June 11, 1985. 1985 Okla. Sess. Laws, p. 1694. Attached as Exhibit 1.

b. Senate Concurrent Resolution No. 82, passed March 31, 1988. 1988 Okla. Sess. Laws, p. 1915. Attached as Exhibit 2.

3. In Wyoming, a severance tax is imposed by the State of Wyoming upon the privilege of severing or extracting coal within the State of Wyoming. WYO. STAT. §§ 39-6-301 to 39-6-308 (1977), as amended.

4. Wyoming's coal severance tax is not assessed against Oklahoma utilities. The severance tax is assessed against the person or companies severing or extracting the coal in Wyoming. The tax is assessed whether the coal is sold or not sold.

5. The valuation of the coal extracted for severance tax purposes is based on the fair market value of the coal. WYO. STAT. § 39-2-202 (1977) sets forth the method of determining valuation of coal for severance tax purposes.

6. Severance tax revenues collected on Wyoming coal are currently used in Wyoming in the following ways, according to WYO. STAT. § 39-6-302:

> Coal severance tax monies, totalling 8.5% of the assessed valuation of the coal, are currently distributed to the following State of Wyoming accounts:
>
> > 2% - to the permanent mineral trust fund and the budget reserve account, WYO. STAT. § 39-6-302(a);

2% - to the general fund, WYO. STAT. § 39-6-302(b);

1.5% - to the water development account or general fund, WYO. STAT. § 39-6-0302(c);

1% - to the highway fund, WYO. STAT. § 39-6-302(d);

.5% - to the permanent mineral trust fund, WYO. STAT. § 39-6-302(e);
1.5% - to the capitol facilities revenue account, WYO. STAT. § 39-6-302(f).

This severance tax rate of 8.5% became effective in 1988. Between 1983 and 1987, the severance tax rate was 10.5%.

7. The amount of coal severed in the State of Wyoming from 1983 through March of 1989 is attached hereto as Exhibit 3. This exhibit also shows the percentage increase or decline for each year.

8. The following Oklahoma electric utilities are subject to the requirements of the Act.

Grand River Dam Authority (G.R.D.A.)

Oklahoma Gas & Electric (OG&E)

Public Service Company of Oklahoma (P.S.O.)

Western Farmers Electric Cooperative (W.F.E.C.)

The following chart describes various features of the affected utilities:

Company	Plant/ Generating Units	Scrubbers*	Gross Generating Capacity (Megawatts)	On-Line
G.R.D.A.	GRDA-1	No	490.0	1981
	GRDA-2	Yes	520.0	1986
OG&E	Muskogee-4	No	572.4	1977
	Muskogee-5	No	572.4	1978
	Muskogee-6	No	572.4	1984
	Sooner-1	No	568.8	1979
	Sooner-2	No	568.8	1980
P.S.O.	Northeastern-3	No	472.5	1979
	Northeastern-4	No	472.5	1980
W.R.C.E.	Hugo-1	No	400.0	1981
Total Gross Generating Capacity			5209.8	

* A scrubber is the common name of a "flue gas desulfurization unit" which is advice designed to remove sulfur emissions from a coal-fired electric plant.

9. The following mining companies which operate coal mines in Wyoming have shipped coal to Oklahoma electric utilities since 1980:

	Coal Company	Current Long Term Wyoming Coal Supplier To:
A.	Kerr-McGee Coal Corporation	P.S.O.
	1. Jacobs Ranch Mine	
	2. Clovis Point Mine	
B.	Mobil Coal Producing, Inc.	G.R.D.A.
	1. Caballo Rojo Mine	

C.	Rochelle Coal Company (subsidiary of Peabody Coal) 1. Powder River Coal Mine	
D.	Triton Coal Company (subsidiary of Shell Mining) 1. Buckskin Coal Mine	W.F.E.C.
E.	Exxon Coal USA 1. Rawhide Coal Mine	G.R.D.A.
F.	Amax Mining 1. Bell Ayr Mine 2. Eagle Butte Mine	
G.	Thunder Basin Coal Company (subsidiary of ARCO Mining) 1. Black Thunder Coal Mine 2. Coal Creek Mine	O.G.&E.
H.	NERCO 1. Antelope Mine	

10. For the Grand River Dam Authority, the percentage of total coal purchased by the utility and the state of origin are given below:

	Coal Purchased From			
	Wyoming		Oklahoma	
	Short Tons (000)	Percent	Short Tons (000)	Percent
1981	1,236.7	100.0	0.0	0.0
1982	1,679.5	100.0	0.0	0.0
1983	1,522.4	100.0	0.0	0.0
1984	2,112.7	99.5	10.1	0.5
1985	2,278.8	100.0	0.0	0.0
1986	2,499.8	96.8	83.5	3.2
1987	2,054.1	95.5	96.4	4.5
1988	2,703.9	96.6	96.9	3.4
1989				
Jan-Apr	1,273.9	97.4	34.5	2.6

11. For Oklahoma Gas and Electric Company, the percentage of total coal purchased by the utility and the state of origin are given below:

	Coal Purchased From			
	Wyoming		Oklahoma	
	Short Tons (000)	Percent	Short Tons (000)	Percent
1980	5,160.9	100.0	0.0	0.0
1981	5,022.5	100.0	0.0	0.0
1982	5,277.5	100.0	0.0	0.0
1983	4,837.0	100.0	0.0	0.0
1984	6,252.8	100.0	0.0	0.0
1985	6,484.5	99.6	24.2	0.4
1986	5,689.9	98.0	116.2	2.0
1987	5,699.7	93.9	369.8	6.1
1988	5,711.1	92.6	457.5	7.4
1989				
Jan-Apr	2,120.0	96.7	73.1	3.3

12. For the Public Service Company of Oklahoma, the percentage of total coal purchased by the utility and the state of origin are given below:

	Coal Purchased From			
	Wyoming		Oklahoma	
	Short Tons (000)	Percent	Short Tons (000)	Percent
1980	2,838.0	100.0	0.0	0.0
1981	2,765.0	100.0	0.0	0.0
1982	2,593.0	100.0	0.0	0.0
1983	2,816.0	100.0	0.0	0.0
1984	3,281.0	99.7	10.0	0.3
1985	3,044.0	100.0	0.0	0.0
1986	2,865.0	98.1	56.0	1.9
1987	2,786.0	94.3	168.0	5.7
1988	2,583.0	96.5	93.0	3.5
1989				
Jan-Apr	837.0	96.8	28.0	3.2

13. For the Western Farmers Electric Cooperative, the percentage of total coal purchased by the utility and the state of origin are given below:

	Coal Purchased From Wyoming		Oklahoma	
	Short Tons (000)	Percent	Short Tons (000)	Percent
1981	228.0	100.0	0.0	0.0
1982	1,173.3	100.0	0.0	0.0
1983	1,495.8	100.0	0.0	0.0
1984	941.4	100.0	0.0	0.0
1985	1,063.0	100.0	0.0	0.0
1986	696.6	100.0	0.0	0.0
1987	894.6	94.2	55.3	5.8
1988	1,611.9	95.7	71.6	4.3
1989				
Jan-Apr	369.4	97.6	23.3	5.4

14. The average cost of Wyoming coal (including the cost of transportation) delivered to Oklahoma electric utilities has ranged between the following prices from 1982 through 1988. Prices are expressed in cents per million BTU (MMBTU). A BTU is a "British Thermal Unit" which is a measurement of heat energy.

Average Delivered Price (cents per MMBTU)

Year	GRDA	OG&E (Muskogee)	OG&E (Sooner)	PSO	WFEC
1982	171.8	142.1	150.8	183.1	206.3
1983	175.5	151.5	157.5	190.3	205.3
1984	152.5	181.0	163.8	201.1	207.8
1985	140.0	159.1	163.2	202.9	172.2
1986	138.6	156.0	164.6	193.0	169.8
1987	145.2	146.2	161.2	164.7	175.5
1988	104.1	151.3	165.2	161.7	172.4
1989					
Jan-Apr	96.3	132.6	138.8	163.4	196.6

15. The spot price for Wyoming coal sold to Oklahoma electric utilities, from 1984 to 1987, has been as follows:

Average Delivered Price (cents per MMBTU)

	1984	1985	1986	1987
GRDA	152.72	128.06	N/A	N/A
OG&E (Muskogee)	145.16	145.65	126.22	101.42
OG&E (Sooner)	148.09	146.80	N/A	N/A

16. The spot tonnage for Wyoming coal sold to Oklahoma electric utilities from, 1984 to 1987, has been as follows:

(000 tons)
Average Delivered Price (cents per MMBTU)

	1984	1985	1986	1987
GRDA	11.53	469.33	N/A	N/A
OG&E (Muskogee)	447.70	819.74	102.12	99.25
OG&E (Sooner)	44.36	22.53	N/A	N/A

17. No Wyoming spot coal was sold to Oklahoma electric utilities in 1988. The P.S.O. and W.F.E.C. utilities have not purchased Wyoming spot coal from 1981 to April, 1989.

18. For Oklahoma coal delivered to Oklahoma electric utilities, the price for coal (including transportation costs) delivered to Oklahoma electric utilities has ranged in price, from 1984 to 1989, as follows:

Average Delivered Price (cents per MMBTU)

Year	GRDA	OG&E (Muskogee)	OG&E (Sooner)	PSO	WFEC
1984	154.8	**	**	192.8	**
1985	**	163.0	**	**	**
1986	120.9	145.7	166.6	182.3	**
1987	107.8	137.6	164.9	170.9	184.5
1988	107.5	138.0	168.3	164.7	175.5
1989					
Jan-Apr	102.2	131.4	151.4	163.2	173.0

** No coal delivered to this Oklahoma electric utility from Oklahoma mines.

19. For the Grand River Dam Authority, the following tons of coal were purchased from each coal mine or company listed below between 1981 and 1989:

(Nos. in 1,000 tons)

1981	**Wyoming**	1. Exxon (Rawhide)	439.5
		2. Mobil (Caballo Rojo)	797.2
1982	**Wyoming**	1. Exxon (Rawhide)	1,325.9
		2. Mobil (Caballo Rojo)	353.7
1983	**Wyoming**	1. Exxon (Rawhide)	1,392.2
		2. Mobil (Caballo Rojo)	131.7
1984	**Wyoming**	1. Exxon (Rawhide)	1,651.9
		2. Mobil (Caballo Rojo)	460.8
	Oklahoma	1. American Central Energy Inc. (Ranchers)	10.1
1985	**Wyoming**	1. Exxon (Rawhide)	2,201.2
		2. Mobil (Caballo Rojo)	11.2
		3. N.E.R.C.O. (Antelope)	66.3
1986	**Wyoming**	1 Exxon (Rawhide)	1,658.4
		2. Mobil (Caballo Rojo)	841.4

	Oklahoma	1.	AMAX (Rogers)	33.5
		2.	Peabody	50.0
		1.	Exxon (Rawhide)	1,640.7
		2.	Mobil (Caballo Rojo)	413.4
	Oklahoma	1.	K&R	29.5
		2.	AMAX (Rogers)	66.9
1988	Wyoming	1.	Exxon (Rawhide)	1,801.9
		2.	Mobil (Caballo Rojo)	902.0
	Oklahoma	1.	K&R	64.9
		2.	Hickory	30.0
1989	(Jan-Apr) Wyoming	1.	Exxon (Rawhide)	774.3
		2.	Mobil (Caballo Rojo)	499.6
	Oklahoma	1.	K&R	7.8
		2.	AMAX (Alluwe)	25.1
		3.	Phoenix (Phoenix #4)	1.7

20. For the Oklahoma Gas and Electric Plant at Muskogee, the following tons of coal were purchased from each coal mine listed between 1980 and 1988:

1980	Wyoming	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,362.3
		2.	AMAX (Eagle Butte)	274.5
		3.	AMAX (Belle Ayr)	464.2
1981	Wyoming	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	1,761.6
		2.	AMAX (Eagle Butte)	10.7
		3.	AMAX (Belle Ayr)	519.5
1982	Wyoming	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,748.6
1983	Wyoming	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,790.3

1984	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,974.3
		2.	Mobil (Caballo Rojo)	447.7
1985	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,959.9
		2.	Mobil (Caballo Rojo)	819.7
	Oklahoma	1.	Alpine #5	20.0
		2.	K&R (Ryan)	4.2
1986	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,945.1
		2.	Mobil (Caballo Rojo)	102.1
	Oklahoma	1.	Alpine #11	19.4
		2.	Interchem (Pollyanna #3)	2.6
		3.	Alpine #5	47.2
		4.	K&R (Ryan)	27.0
1987	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	3,138.6
		2.	Mobil (Caballo Rojo)	99.3
	Oklahoma	1.	Alpine #11	78.9
		2.	Interchem (Polly. H&O, Checotah)	16.7
		3.	K&R (Ryan, Bokoshe)	103.1
1988	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	3,379.5
	Oklahoma	1.	Alpine #11	85.4
		2.	Interchem (Pollyanna #5)	.7
		3.	AMAX (Pollyanna #5)	37.3
		4.	Interchem (Checotah)	46.8
		5.	Sunset	15.2
		6.	K&R (Ryan & Bokoshe)	64.9
1989	**(Jan-Apr)**			
	Wyoming	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	1,110.7
		2.	Rochelle Coal Co. (Powder River Coal Mine)	159.9

Oklahoma	1.	Alpine #11	4.2
	2.	Interchem (Pollyanna #5)	4.8
	3.	AMAX (Pollyanna #5)	16.0
	4.	Hickory	11.6
	5.	Sunset	18.0
	6.	Rabbit Hill	.2

21. For the Oklahoma Gas and Electric Sooner Plant near Red Rock, Oklahoma, the following tons of coal were purchased from each coal mine or company listed between 1980 and 1989:

1980	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,059.9
1981	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,733.8
1982	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,528.9
1983	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,046.7
1984	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,786.5
		2.	Mobil (Caballo Rojo)	44.4
1985	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,682.4
		2.	Mobil (Caballo Rojo)	22.5
1986	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,642.8
	Oklahoma	1.	Alpine #5	1.1
		2.	Catoosa	19.0
1987	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,461.8

	Oklahoma	1.	AMAX (Pollyanna #5)	46.9
		2.	AMAX (Rogers)	72.7
		3.	Alpine #11	51.1
1988	**Wyoming**	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	2,331.6
	Oklahoma	1.	Hickory	24.3
		2.	Patch (Welch)	10.0
		3.	AMAX (Pollyanna #5)	25.2
		4.	AMAX (Rogers)	104.5
		5.	Alpine #11	40.0
		6.	K&R (Bokoshe)	2.8
1989	**(Jan-Apr)**			
	Wyoming	1.	Thunder Basin Coal Co./ARCO (Black Thunder Mine)	850.6
	Oklahoma	1.	Hickory	12.3
		2.	Peabody	6.0

22. For the Public Service Company of Oklahoma, the following tons of coal were purchased from each coal mine or company listed between 1980 and 1989:

1980	**Wyoming**	1.	Kerr-McGee Coal (Jacob's Ranch)	2,773.0
		2.	Kerr-McGee Coal (Clovis Point)	65.0
1981	**Wyoming**	1.	Kerr-McGee Coal (Jacob's Ranch)	1,408.0
		2.	Kerr-McGee Coal (Clovis Point)	1,357.0
1982	**Wyoming**	1.	Kerr-McGee Coal (Jacob's Ranch)	959.0
		2.	Kerr-McGee Coal (Clovis Point)	1,634.0
1983	**Wyoming**	1.	Kerr-McGee Coal (Jacob's Ranch)	1,356.0
		2.	Kerr-McGee Coal (Clovis Point)	1,560.0

1984	Wyoming	1.	Kerr-McGee Coal (Jacob's Ranch)	2,200.0
		2.	Kerr-McGee Coal (Clovis Point)	1,081.0
1985	Wyoming	1.	Kerr-McGee Coal (Jacob's Ranch)	1,621.0
		2.	Kerr-McGee Coal (Clovis Point)	1,423.0
1986	Wyoming	1.	Kerr-McGee Coal (Jacob's Ranch)	1,475.0
		2.	Kerr-McGee Coal (Clovis Point)	1,390.0
	Oklahoma	1.	McNabb	56.0
1987	Wyoming	1.	Kerr-McGee Coal (Jacob's Ranch)	1,292.0
		2.	Kerr-McGee Coal (Clovis Point)	1,494.0
	Oklahoma	1.	McNabb	168.0
1988	Wyoming	1.	Kerr-McGee Coal (Jacob's Ranch)	2,201.0
		2.	Kerr-McGee Coal (Clovis Point)	382.0
	Oklahoma	1.	Patch (Welch)	10.0
		2.	Phoenix	20.0
		3.	K&R	8.0
		4.	McNabb	52.0
		5.	Hickory	3.0
1989	(Jan-Apr) Wyoming	1.	Kerr-McGee Coal (Jacob's Ranch)	837.0
	Oklahoma	1.	Patch	17.0
		2.	Phoenix	11.0

23. For the Western Farmers' Electric Cooperative, the following tons of coal were purchased from each coal mine or company listed between 1981 and 1989:

1981	**Wyoming**	1.	Triton Coal/Shell (Buckskin)	228.0
1982	**Wyoming**	1.	Triton Coal/Shell (Buckskin)	1,173.3
1983	**Wyoming**	1.	Triton Coal/Shell (Buckskin)	1,495.7
1984	**Wyoming**	1.	Triton Coal/Shell (Buckskin)	941.4
1985	**Wyoming**	1.	Triton Coal/Shell (Buckskin)	1,063.4
1986	**Wyoming**	1.	Triton Coal/Shell (Buckskin)	464.1
		2.	Mobil (Caballo Rojo)	232.5
1987	**Wyoming**	1.	Triton Coal/Shell (Buckskin)	894.6
	Oklahoma	1.	AMAX	55.3
1988	**Wyoming**	1.	Triton Coal/Shell (Buckskin)	1,611.9
	Oklahoma	1.	AMAX	71.7
1989	**(Jan-Apr)**			
	Wyoming	1.	Triton Coal/Shell (Buckskin)	369.4
	Oklahoma	1.	Hickory	23.4

24. The average sulfur content of coal coming from Wyoming's Powder River Basin is:

Year	Avg. Sulfur Content (Wt. Pct.)
1980	0.38
1981	0.40
1982	0.40
1983	0.40
1984	0.40
1985	0.40
1986	0.40
1987	0.38
1988	0.38

25. The average sulfur content of Oklahoma coal delivered to Oklahoma utilities is:

Year	Avg. Sulfur Content (Wt. Pct.)
1985	1.20
1986	1.86
1987	1.36
1988	1.28
1989 (Jan-Apr)	1.51

26. The average sulfur content of Oklahoma coal delivered to each of the following utilities is as follows:

(Wt. Pct.)

Year	PSO	W.F.E.C.	OG&E (Sooner)	OG&E (Muskogee)	G.R.D.A.
1984	.55	na	na	na	.58
1985	na	na	na	1.19	na
1986	.56	na	.60	1.35	3.62
1987	.58	.73	.78	1.63	3.60
1988	.51	.78	1.12	1.41	3.52
1989 (Jan-Apr)	.44	.55	1.46	1.02	3.91

27. In 1988, coal produced in Wyoming was shipped to 19 states. The percentage of tonnage shipped to each state is attached hereto as Exhibit 4.

28. Coal that is shipped from Wyoming to Oklahoma is shipped by railroad transportation. When the Act went into effect, all Wyoming coal destined for Oklahoma was shipped out of Wyoming by the Burlington Northern Railroad.

29. In 1986, Wyoming was the second leading state in the nation in coal production. In 1988, Wyoming became

the leading state in the nation in coal production. This ranking is based on total tonnage of coal produced and not upon the BTU value of the coal.

30. The Grand River Dam Authority is an agency of the State of Oklahoma.

31. The government of the State of Wyoming does not sell any coal.

32. Oklahoma coal used by Oklahoma electric utilities generally has, on the average, a higher BTU rating than Wyoming coal delivered to Oklahoma electric utilities. It would therefore, take less of this Oklahoma coal by weight to generate the same amount of energy as compared to Wyoming coal that has been delivered to Oklahoma utilities.

33. The average BTU content of Wyoming coal delivered to Oklahoma utilities since 1981 has varied between 7,760 to 8,936 per pound.

34. The average BTU content of Oklahoma coal delivered to Oklahoma utilities since 1981 has varied between 11,346 to 13,651 per pound.

Respectfully submitted this 11th day of August, 1989.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,

Plaintiff,

vs.

STATE OF OKLAHOMA,

Defendant.

ORIGINAL ACTION

BRIEF ON THE MERITS FOR THE STATE OF OKLAHOMA

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May, 1991
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ISSUES PRESENTED

I

Whether, under the facts developed, the small incidental effect Oklahoma's Act may have on the State of Wyoming's collection of coal severance tax -- at most, an effect of less than 1% -- is of a sufficient "serious magnitude" to warrant the continued exercise of this Court's original jurisdiction.

II

Under the facts developed, does the State of Wyoming have standing to challenge Oklahoma's Act on Commerce Clause grounds, when the facts as developed show: 1) Wyoming is not engaged in the Commerce affected by Oklahoma's Act, 2) Wyoming's consumer interest is not affected, and 3) at most, Oklahoma's Act has an incidental effect of less than 1% on Wyoming's collection of its coal severance tax.

III

Whether Oklahoma's Act advances legitimate local purposes that cannot be adequately served by reasonable non-discriminatory alternatives.

IV

Whether the provisions of Oklahoma's Act are within the lawful authority of a state to regulate matters relating to the local retail sale of electrical power, and thus not violative of the Commerce Clause.

V

Whether Oklahoma's Act, if found to unlawfully discriminate against interstate commerce when applied to privately owned utilities, may nevertheless be lawfully applied to a state-owned utility, as a market participant.

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PROPOSITION I

UNDER THE FACTS DEVELOPED, WYOMING'S CLAIM THAT OKLAHOMA'S ACT HAS CAUSED IT TO LOSE COAL SEVERANCE TAX REVENUES IS NOT OF A SUFFICIENTLY SERIOUS MAGNITUDE TO "NECESSITATE" THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION, AS:

1. WYOMING IS NEITHER ENGAGED IN THE COMMERCE DIRECTLY AFFECTED BY OKLAHOMA'S ACT, NOR A CONSUMER AFFECTED BY THE ACT;

2. IF A STATE'S LOSS OF TAX REVENUES, DUE TO A DECLINE IN COMMERCE, ALLEGEDLY CAUSED BY A SISTER STATE'S STATUTE, CONSTITUTED SUFFICIENT GROUNDS TO WARRANT THE EXERCISE OF ORIGINAL JURISDICTION, VIRTUALLY EVERY NEGATIVE COMMERCE CLAUSE CASE, IN WHICH THE COMMERCE IS SUBJECT TO STATE TAX, COULD BE BROUGHT AS AN ORIGINAL ACTION IN THIS COURT;

3. OKLAHOMA'S ACT, AT MOST, HAS AN INDIRECT AND DE MINIMIS EFFECT UPON THE COLLECTION OF WYOMING'S COAL SEVERANCE TAX;

4. OKLAHOMA'S ACT ONLY DELAYS THE COLLECTION OF SEVERANCE TAXES;

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1. WYOMING IS NEITHER A PARTICIPANT IN THE COMMERCE AFFECTED BY THE ACT, NOR A CONSUMER AFFECTED BY THE ACT; AND

2. THE INDIRECT, DE MINIMIS IMPAIRMENT OF WYOMING'S COAL SEVERANCE TAX REVENUES, IF ANY, DOES NOT CONSTITUTE SUFFICIENT INJURY TO SUPPORT STANDING. 37

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No. 112, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

STATE OF OKLAHOMA'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

INTRODUCTION

The Government of the State of Wyoming does not sell coal. (Stipulations para. 31; WY Appendix, A-19).[1] Despite the fact

[1] Both the State of Wyoming and Oklahoma filed separate Appendixes. Throughout this brief the State of Oklahoma will refer to Wyoming's Appendix as "WY Appendix" and to Oklahoma's Appendix as "OK

that it is not itself engaged in the production or sale of coal, Wyoming, in this original action, brings a Commerce Clause challenge to an Oklahoma statute, which requires that coal-burning utility plants located in Oklahoma, and producing electricity for sale to consumers in Oklahoma, burn a minimum of 10% Oklahoma mined coal. Okla. Stat., tit. 45, §§ 939 and 939.1 (Supp. 1990) (Oklahoma Act).

The Oklahoma Act's requirement that a 10% Oklahoma mined coal mixture be burned is not an absolute requirement. Rather, it only attaches if the cost of compliance is within 5% of "the energy costs of existing long-term contracts for out-of-state coal." Okla. Stat., tit. 45, § 939.1 (Supp. 1990), and Okla. Stat. tit. 74, § 85.32 (Supp. 1990).

Appendix."

FOUR CONSUMERS AFFECTED BY OKLAHOMA'S ACT

The Oklahoma Statute affects only four consumers of coal - three privately owned, and one state owned:

1. Oklahoma Gas and Electric (OG&E),
2. Public Service Company of Oklahoma (PSO),
3. Western Farmers Electric Cooperative (WFEC), and
4. The Grand River Dam Authority (GRDA), a state owned utility. (Stipulation, para. 8; WY Appendix, A-5, and Stipulation, para. 30; WY Appendix, A-19).

HISTORY OF VOLUNTARY PURCHASES OF OKLAHOMA COAL BEFORE THE PASSAGE OF OKLAHOMA'S ACT

Long before the Act's effective date, January 1, 1987, Oklahoma's coal-burning utilities were purchasing Oklahoma coal. In 1984, Oklahoma utilities purchased 20,100 tons of Oklahoma coal; in 1985, they

purchased 24,200 tons; and in 1986, they purchased 255,700 tons of Oklahoma coal. (Stipulations, paras. 10-13; WY Appendix, A-7 - A-9).

GOAL OF OKLAHOMA'S ACT

In enacting the challenged statutes, Oklahoma sought to: 1) lessen its utility companies' reliance on a single source of supply, primarily shipped by one railroad company, and 2) lessen the potential harm to their consumers cause by energy supply cutoffs. (WY Exhibit G, Answer to Interrogatory No. 2; OK Appendix, 60a).

HIGH COST OF TRANSPORTING WYOMING COAL BY RAILROAD AND SOLE RELIANCE ON SINGLE RAILROAD.

All Wyoming coal coming into Oklahoma is shipped by railroad. When Oklahoma's Act was enacted and went into effect, all Wyoming coal destined for Oklahoma was shipped out of Wyoming on one railroad -

the Burlington Northern. (Stipulation, para. 28; WY Appendix, A-18).

The fact that all Wyoming coal comes to Oklahoma by way of rail is significant because the cost of transporting the coal from Wyoming by railroad constituted between 45% to 76% of the delivered price of Wyoming coal. Between 1981 and 1988, the cost of railroad transportation constituted from 59.9% to 76.4% of the Grand River Dam Authorities' total delivered cost of Wyoming coal. (OK Exhibit C, Affidavit of Mary Stauffer; OK Appendix, 6a). Between 1981 and 1988, Oklahoma Gas and Electric Company's cost of rail transportation constituted from 55% to 73% of the total delivered cost of Wyoming coal. (OK Exhibit D, Affidavit of J.T. Coffman; OK Appendix, 8a). Between 1982 and 1988, the cost of rail transportation constituted from 50% to 70% of the total delivered price of coal for Western Farmers

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Electric Cooperative. (OK Exhibit E, Affidavit of Roger A. Orme; OK Appendix, 10a-11a). And between 1979 and 1988, the cost of rail transportation constituted from 45% to 65% of Public Service Company's total cost of Wyoming coal, delivered to its Oologah plant. (OK Exhibit F, Affidavit of Masoud Mohmoud-nejad; OK Appendix, 12a-13a).

Given the fact that so much of the cost of Wyoming coal is its railroad transportation cost, it is not surprising that Oklahoma, seeking to control local utility rates, looked to local coal supplies.

COMPARISON OF PHYSICAL PROPERTIES OF WYOMING AND OKLAHOMA COAL

Although local Oklahoma coal supplies are available, those supplies, by virtue of the physical characteristics of Oklahoma's

coal, do not constitute a primary source of fuel for Oklahoma utilities.

Sulfur Content

Oklahoma coal, in the main, is high sulfur coal. While the average sulfur content of coal from Wyoming's Powder River Basin, from 1980 to 1988, ranged from 0.38 to 0.40, the average sulfur content of Oklahoma coal delivered to Oklahoma utilities between 1985 and 1989 ranged from 1.20 to 1.86. (Stipulations, para. 24 and 25; WY Appendix, A-17 -- A-18.)

Burning of a 10%/90% Coal Mixture Meets Sulfur Emission Standards.

While Oklahoma's high sulfur coal does not burn as cleanly as Wyoming's lower sulfur coal, all coal-fired generating units in Oklahoma can burn a 10%/90% blend of Oklahoma to Wyoming coal without violating sulfur emission standards. (OK

Exhibit H, Affidavit of James S. Hamm, Jr. para. 4, B; OK Appendix, 28a).

British Thermal Units

To some extent, the average high sulfur content of Oklahoma coal is offset by its correspondingly high BTU (British Thermal Unit) rating. It takes much less Oklahoma coal to generate the same amount of energy, as compared to Wyoming coal. (Stipulation para. 32; WY Appendix, A-19). While the average BTU content of Wyoming coal delivered to Oklahoma utilities, since 1981, has ranged between 7,760 to 8,936 per pound, the average BTU content of Oklahoma coal delivered to Oklahoma utilities, since 1981, is much higher, ranging between 11,346 and 13,651 per pound. (Stipulation, paras. 33 and 34; WY Appendix, A-19).

Thus, though Oklahoma coal is higher in sulfur content, it takes far less Oklahoma coal to produce the needed BTU's. In fact,

given the statistics above, it would, on average, take more than a pound-and-a-half of Wyoming coal to equal the British Thermal Unit output of one pound of Oklahoma coal. (Id.)

OKLAHOMA'S CONSERVATION MEASURE BASED ON DIFFERING PHYSICAL PROPERTIES OF OKLAHOMA AND WYOMING COAL

The high BTU properties of Oklahoma coal, combined with its high sulfur content, make the use of Oklahoma coal, in a 10/90 blend, well suited to producing the needed energy, while conserving cleaner Wyoming coal for use by future generations. If Wyoming coal reserves were sufficient to meet energy needs for the next 100 years, burning Wyoming coal in a 10/90 blend with Oklahoma coal, would extend the availability of the cleaner coal for an additional ten years.

WYOMING'S COAL SEVERANCE TAX

As noted above, the State of Wyoming is not in the coal production business, and does not sell coal. While eight Wyoming companies have, since 1980, shipped coal into Oklahoma (Stipulation, para. 9; WY Appendix, A-6 -- A-7), none of those companies has brought an action to challenge Oklahoma's Act. Rather, Wyoming seeks to challenge the statute based upon its taxing interest. Wyoming taxes the severance of coal, and brings its challenge based on an alleged loss of severance tax revenues, allegedly caused by Oklahoma's Act.

WYOMING COAL PRODUCERS PAY SEVERANCE TAX FOR THE PRIVILEGED OF SEVERING COAL FROM THE GROUND

The State of Wyoming's severance tax is a tax upon the privilege of severing or extracting coal within the State of Wyoming. (Stipulation, para. 3; WY

Appendix A-4). The severance tax is assessed against those persons or companies who sever or extract coal within the State of Wyoming, and is not imposed upon Oklahoma utilities. (Stipulations, paras. 3 and 4; WY Appendix, A-4).

SEVERANCE TAX NOT A SALES TAX

The severance tax is not a sales tax. The tax is assessed whether the coal is sold or not. (Stipulation, para. 4; WY Appendix, A-4). The amount of the Wyoming severance tax is determined by multiplying the applicable statutory rate by the severed coal's fair market value. (Stipulation, para. 5; WY Appendix, A-4 -- A-5).

WYOMING'S VOLUNTARY REDUCTION OF ITS SEVERANCE TAX RATE

Between 1983 and 1987, the Wyoming severance tax rate was 10.5% (Stipulation, para. 6; WY Appendix, A-4). Wyoming lowered its severance tax rate to 8.5% in 1988. (Stipulation, para. 6; WY Appendix, A-4 and A-5).

ALLEGED REDUCTION IN SEVERANCE TAX COLLECTION AS BASIS FOR WYOMING'S COMMERCE CLAUSE CLAIM.

The severance tax statutes serve as the basis for Wyoming's challenge to Oklahoma's Act.[2] Wyoming argues that a ton of coal

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[2] Although not plead in its Complaint, Wyoming attempted to introduce unpleaded grounds as additional bases for their challenge, including an alleged reduction in the amount of ad valorem taxes Wyoming collects from coal mined in Wyoming, and an alleged reduction of royalties received on coal mined from federally owned land in Wyoming. The Special Master in his Report refused to consider these additional unpleaded grounds, finding that it would be inappropriate to do so, since Wyoming neither sought nor was granted leave to file an amended Complaint. (Report of Special Master, 14 and 15). Because

not sold to an Oklahoma utility, by virtue of the challenged Act, is a ton of coal that is not produced, and therefore a ton of coal on which severance tax is not collected. (Response of State of Wyoming to the State of Oklahoma's Motion for Summary Judgment and Brief in Support of Response, at 16). Thus, Wyoming concludes that it has been injured by the challenged Act, because it has not been able to collect as much severance taxes as it would have, if more coal had been sold in Oklahoma.[3]

Wyoming's brief does not quarrel with this ruling of the Special Master, those unplead grounds are not properly before this Court, and accordingly are not addressed in this brief.

[3] In addition to this argument, Wyoming also alleged that because of the alleged reduction in tax revenue, it had standing as parens patriae to bring an action on behalf of its citizens. (Complaint, para. 9, 5). The Special Master rejected Wyoming's argument that it had standing to sue on the basis of parens patriae (Report of the Special Master, 17). Because Wyoming's brief does not quarrel

PRODUCTION OF WYOMING COAL INCREASED AFTER PASSAGE OF OKLAHOMA'S ACT

In short, Wyoming takes the position that Oklahoma's Act has a direct effect on Wyoming coal production and thus has an effect upon Wyoming's severance tax collections. As the stipulated facts demonstrate, however, from 1983 until the present, Wyoming's coal production has generally increased.

In the only two years since the passage of the Act for which complete figures are available, Wyoming coal production continued to increase. (Exhibit 3 to Exhibit A, Stipulation of Facts; OK Appendix, 63a) Indeed, in 1986, Wyoming was the second leading state in the nation in coal production, and in 1988, after Oklahoma's Act had been in effect for

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with this finding of the Special Master, this issue is not before the Court, and is not addressed in this brief.

nearly two years, Wyoming became the nation's leading coal producer. (Stipulation para. 29; WY Appendix A-18 - 19).

DECLINE IN SEVERANCE TAX REVENUE DUE TO REDUCTION IN TAX RATE AND FALL IN THE PRICE OF WYOMING COAL.

While Wyoming's coal severance revenues may have declined, the decline was not due to a decrease in production, but rather was due to two other factors:

1. The decline in the price of Wyoming coal (OK Exhibit G, Affidavit of David M. Weinstein, para. 7; OK Appendix, 19a-21a), and

2. Wyoming's lowering of its severance tax rate from 10.5% to 8.5% (Stipulation, para. 6; WY Appendix, A-4 -- A-5).

As noted above, Wyoming's severance tax is assessed when the coal is severed, whether the coal ever sells or not (Stipulation, para. 4; WY Appendix, A-4). Indeed, while the severance tax is based

upon the fair cash market value of the coal when severed, the Wyoming statutes specifically provide for methods of evaluation when the severed coal is not sold. Wyo. Stat., § 39-2-202(d). Wyoming, through its artful language, continues to suggest that "the amount of severance tax collected depends directly on the sale of Wyoming coal by Wyoming producers." (Corrected Exceptions of the State of Wyoming to the Report of the Special Master, 6). Wyoming statutes and the stipulations of the parties, however, make it clear that there is no such direct dependence. Wyoming severance tax is collected whether the severed coal is sold or not.

AT MOST OKLAHOMA'S ACT HAS AN INDIRECT AND DE MINIMIS EFFECT ON SEVERANCE TAX COLLECTIONS.

Yet, even if there were a direct relationship between a lost sale in

Oklahoma, and Wyoming's severance tax collection, the loss to Wyoming's severance tax collection is de minimis. Wyoming's own expert, based upon this direct correlation theory of Wyoming's, estimated that in 1987 the State of Wyoming would have lost $535,886, and in 1988, $542,352 (WY Exhibit B, Affidavit of Richard J. Marple, para. 12, 3; Appendix to Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion). When these amounts are compared with the total amount of severance tax collected in those years, $115,554,537, and $85,473,232, (OK Exhibit B, Plaintiff's Response to Defendant's Interrogatory, Exhibit 4 at page 2, OK Appendix, 72a), we see that even if a direct relationship exists between a lost sale in Oklahoma and Wyoming's severance tax collection, the loss, at most, would amount to but a fraction of 1% of the severance tax collected by Wyoming.

POSITION OF THE STATE OF OKLAHOMA

It is the position of the State of Oklahoma that:

1. Under the facts developed, the case before the Court is not an appropriate case for the exercise of this Court's original jurisdiction.

2. Under the facts developed, the State of Wyoming lacks the requisite standing to challenge Oklahoma's Act on Commerce Clause ground.

3. Oklahoma's Act advances legitimate local purposes that cannot be adequately served by reasonable, non-discriminatory alternatives.

4. Oklahoma's Act is part of the State's regulations relating to the retail rates charged by public utilities, a regulatory area which Congress has left to the states.

5. Even if otherwise infirm, Oklahoma's Act, being severable, can be

constitutionally applied to state-owned utilities.

SUMMARY OF THE ARGUMENT

The interest Wyoming asserts in challenging Oklahoma's Act, on Commerce Clause grounds, is not the interest of a market participant or a consumer, but rather the interest of a tax collector. Under the facts developed, Oklahoma's Act, at most, has an indirect and de minimis effect upon Wyoming's collection of coal severance taxes. Under the evidence most favorable to Wyoming, the tax has less than a 1% effect upon its tax collection efforts. That indirect effect is further minimized by the fact that Oklahoma's Act, in conserving clean-burning Wyoming coal for future use, only delays, and does not preclude, Wyoming's tax collection efforts.

Under the facts developed, this Court would be establishing a dangerous precedent by continuing to exercise original jurisdiction in this cause. If a state's loss of de minimis tax revenues, due to a decline in commerce allegedly caused by a sister state constituted sufficient grounds to warrant the exercise of this Court's original jurisdiction, virtually every negative commerce clause case, in which the commerce was subject to state tax, could be brought as an original action in this Court.

Because the State of Wyoming is not a participant in the commerce affected by Oklahoma's Act, nor a consumer affected by the Act, and because the indirect, de minimis impairment of Wyoming's coal severance tax collections, if any, does not constitute sufficient injury to support standing, the State of Wyoming lacks standing to challenge Oklahoma's Act.

Oklahoma has a vital interest in 1) insuring that electrical power is available to its citizens at the lowest possible price, and 2) avoiding interruptions in utility service caused by catastrophes such as railroad strikes, supply cutoffs and the like. To further these legitimate interests, Oklahoma adopted the challenged Act to 1) reduce Oklahoma utility companies' reliance on a single source of fuel supply, primarily shipped by one railroad company, and 2) reduce the potential harm to its consumers caused by energy supply cutoffs. Clean-burning coal is conserved by requiring that clean-burning Wyoming coal be burnt with 10%, high sulfur Oklahoma coal. This requirement, which enables Oklahoma utilities to meet sulfur emission standards, conserves and preserves clean-burning Wyoming coal for future use, thus

advancing Oklahoma's interest in avoiding long term fuel supply unavailability.

Oklahoma's Act also has an immediate effect upon fuel supplies, by limiting Oklahoma's reliance on a single source shipped by one rail company, thus enabling Oklahoma stockpiles of cleaner Wyoming coal to last 10% longer.

These legitimate local purposes advanced by Oklahoma's Act cannot be adequately served by reasonable non-discriminatory alternatives, as Oklahoma's Act is based upon the differing physical characteristics between Wyoming and Oklahoma coal, and designed to avoid the high cost of transporting Wyoming coal by rail, which constitutes between 45% and 76% of the total delivered cost of Wyoming coal.

Oklahoma's Act operates to regulate local utility rates, and accordingly is within the "lawful authority" of the State,

and is not violative of the Commerce Clause.

Even if Oklahoma's Act were found to violate the Commerce Clause, when applied to privately owned utilities, the Act, nevertheless could be applied to the Grand River Dam Authority, a state owned utility, under the market participate doctrine. The Oklahoma Legislature's intent that the Act be applied to State utilities, even if it could not be applied to privately owned utilities, was manifested by the Legislature's inclusion of a severability clause in the Oklahoma Act. The Legislature's intent is consistent with longstanding Oklahoma law that where a statute on its face is applicable to several classes of persons or cases, the constitutionality of the statute as applied to one class may be upheld at the same time as its applicability to other classes is stricken down as unconstitutional.

ARGUMENT

PROPOSITION I

UNDER THE FACTS DEVELOPED, WYOMING'S CLAIM THAT OKLAHOMA'S ACT HAS CAUSED IT TO LOSE COAL SEVERANCE TAX REVENUES IS NOT OF A SUFFICIENTLY SERIOUS MAGNITUDE TO "NECESSITATE" THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION, AS:

1. WYOMING IS NEITHER ENGAGED IN THE COMMERCE DIRECTLY AFFECTED BY OKLAHOMA'S ACT, NOR A CONSUMER AFFECTED BY THE ACT;

2. IF A STATE'S LOSS OF TAX REVENUES, DUE TO A DECLINE IN COMMERCE, ALLEGEDLY CAUSED BY A SISTER STATE'S STATUTE, CONSTITUTED SUFFICIENT GROUNDS TO WARRANT THE EXERCISE OF ORIGINAL JURISDICTION, VIRTUALLY EVERY NEGATIVE COMMERCE CLAUSE CASE, IN WHICH THE COMMERCE IS SUBJECT TO STATE TAX, COULD BE BROUGHT AS AN ORIGINAL ACTION IN THIS COURT;

3. OKLAHOMA'S ACT, AT MOST, HAS AN INDIRECT AND DE MINIMIS EFFECT UPON THE COLLECTION OF WYOMING'S COAL SEVERANCE TAX;

4. OKLAHOMA'S ACT ONLY DELAYS THE COLLECTION OF SEVERANCE TAXES;

5. ALTERNATIVE FORUMS ARE AVAILABLE TO THE REAL PARTIES IN INTEREST - THE WYOMING COAL PRODUCERS - SHOULD THEY SEEK TO CHALLENGE OKLAHOMA'S ACT.

INTRODUCTION

As noted above, Wyoming is neither engaged in the commerce affected by Oklahoma's Act, nor does Oklahoma's Act affect Wyoming's consumer interest. The interest which Wyoming seeks to protect is its interest as a tax collector.

If the incidental loss of tax revenues, which accompanies a reduction in interstate commerce, is sufficient to warrant this Court's exercise of original jurisdiction, than virtually every negative commerce clause case -- where the commerce is subject to state tax -- could be brought as an original action. Thus, if subject to state tax, any reduction in the in-state sale of timber, cement, milk, cantaloupe, or live fish bait, and the like, if reduced

by the action of a sister state, could form the basis of an original action. This Court's prior teachings on the nature of its original jurisdiction militate against this Court exercising original jurisdiction upon such grounds, and thus militate against continuing to exercise original jurisdiction under the facts present in this case.

STANDARDS FOR DETERMINING WHEN EXERCISE OF ORIGINAL JURISDICTION IS APPROPRIATE

As noted in Illinois v. Milwaukee, 406 U.S. 91, 93 (1972), "[i]t has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.'" (quoting from Utah v. United States, 394 U.S. 89, 95 [1969]).

In conformity with this philosophy, this Court has held that its original jurisdiction should not be exercised unless it is "absolutely necessary." Commenting

on the character of its original jurisdiction, this Court in Louisiana v. Texas, 176 U.S. 1, 15 (1900), stated:

> [I]t is apparent that the [original] jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute. . . .

Similarly, in Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 505 (1971), this Court required the establishment of the "strictest necessity" to justify the invoking of original jurisdiction.

This Court has also required that a state, seeking to invoke original jurisdiction to control the conduct of another state, must establish that the threatened invasion of its rights is of a "serious magnitude." State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. 660, 669 (1931); New York v. New Jersey, 256 U.S. 296, 309 (1921); and Missouri v. Illinois, 200 U.S. 496, 521 (1906).

Additionally, a state seeking such relief has a greater burden than that generally required of private parties seeking injunctive relief. State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. at 669; and North Dakota v. Minnesota, 263 U.S. 365, 374 (1923).

As noted in Justice Rehnquist's dissent in Maryland v. Louisiana, 451 U.S. 725, 762 (1981), this Court has recognized that expending its time and resources on original jurisdiction cases detracts from the Court's primary appellate duties.

> "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." . . . Original jurisdiction cases represent an 'intrusion on society's interest in our most deliberate and considerate performance of our paramount role as a supreme federal appellate court. . . .' [citations omitted].

THE INTEREST ADVANCED BY WYOMING IS DE MINIMIS AND WYOMING'S OWN FACTS AND FIGURES SHOW IT.

In the case at hand, the interest advanced by Wyoming, does not, under the facts developed in this case, justify the court's continued exercise of original jurisdiction. Here Wyoming's claim is derivative. Oklahoma's Act, viewed in the light most favorable to Wyoming, only has a de minimis effect on Wyoming's severance tax collection. Wyoming's own facts and figures demonstrate this. In 1987, Wyoming collected $115,554,537 in severance tax revenues. (OK Exhibit B, Plaintiff's Response to Defendant's Interrogatory, Exhibit 4 at page 2; OK Appendix, 64a). Wyoming's own witness testified that the loss attributable to Oklahoma's Act was far less than 1% of the total taxes collected. (WY Exhibit B, Affidavit of Richard J.

Marple, at 3; Appendix to Motion of the State of Wyoming for Summary Judgment).

In 1988, the State of Wyoming collected $85,473,232 in coal severance tax, and Wyoming's expert testified that the lost tax revenues he attributed to Oklahoma's Act again amount to less than 1% of the total collected. (Id.) Thus, even if this Court were to accept Wyoming's position that there is a direct correlation between a lost sale in Oklahoma and production of coal in Wyoming, the incidental effect upon Wyoming's collection of coal severance tax revenues is de minimis, as it amounts, at most, to less than a 1% reduction.

As noted, this Court has required that a state seeking to invoke original jurisdiction to control the conduct of another state establish that the threatened invasion of its rights is of a "serious magnitude." State of Connecticut v. Commonwealth of Massachusetts, 282 U.S.

660, 669 (1931); New York v. New Jersey, 256 U.S. 296, 309 (1921); Missouri v. Illinois, 200 U.S. 496, 521 (1906). The incidental, de minimis, less-than-1% effect that Oklahoma's Act may have upon Wyoming's severance tax collection does not present a matter of such "serious magnitude"; this is particularly so, as this less-than-1% effect only amounts to a delay in tax collection.

THE DE MINIMIS NATURE OF WYOMING'S CLAIM IS FURTHER REDUCED BECAUSE OKLAHOMA'S ACT DOES NOT PRECLUDE TAX COLLECTION, BUT MERELY DELAYS COLLECTION.

One of the reasons that Oklahoma requires the burning of a 10%/90% blend of Oklahoma to Wyoming coal is to lessen the potential harm to Oklahoma consumers caused by energy supply cutoffs. (WY Exhibit G, Answer to Interrogatory No. 2; OK Appendix, 60a). The burning of 10% Oklahoma coal, which, in the main, has a high sulfur

content, has the effect of conserving cleaner Wyoming coal's availability to Oklahoma consumers. If Wyoming's coal reserves were sufficient to meet the energy needs of the Oklahoma utilities for the next one hundred years, the burning of the required blend would prolong that availability an additional ten years. This conservation of Wyoming coal for sale in the future does not reduce Wyoming severance tax collection, rather, it merely delays it. Viewed in this light, the effect of Oklahoma's Act upon Wyoming's tax collections is de minimis in the extreme.

THE DE MINIMIS NATURE OF WYOMING'S CLAIM IS FURTHER REDUCED BY NOTING THAT BEFORE THE PASSAGE OF OKLAHOMA'S ACT, OKLAHOMA UTILITIES VOLUNTARILY BOUGHT OKLAHOMA COAL.

The de minimis nature of the effect of Oklahoma's Act upon Wyoming's tax collections is further demonstrated by noting that prior to the Oklahoma Act's

effective date, Oklahoma utilities had been voluntarily purchasing significant amounts of Oklahoma coal. In 1984, Oklahoma utilities purchased 20,100 tons of Oklahoma coal, increased that amount, in 1985, to 24,200 tons, and multiplied that many fold, in 1986, by purchasing 255,700 tons of Oklahoma coal. (Stipulations, para. 10-13; WY Appendix A-7 - A-9). Wyoming's witness failed to take these purchases into account when he estimated the Act's effect on the collection of coal severance tax. (OK Exhibit G, Affidavit of David Weinstein, para. 8; OK Appendix, 21a). Thus, his estimates, though only showing a de minimis effect, overstated the Act's effect on tax collection.

THE DE MINIMIS NATURE OF WYOMING'S CLAIM IS FURTHER REDUCED BY THE FACT THAT ONE OF THE FOUR CONSUMERS WHO MUST COMPLY WITH THE ACT IS THE STATE OF OKLAHOMA ITSELF.

Making the Oklahoma Act's effect upon Wyoming severance tax collection even more de minimis is the fact that one of the four consumers required to comply with the Act is the State of Oklahoma itself, namely, the state-owned utility, the Grand River Dam Authority. The State, as market participant, may choose to prefer the products of one producer over another without violating the Commerce Clause.

IN LIGHT OF THE DE MINIMIS TAX COLLECTION INTEREST ASSERTED BY WYOMING, IT WOULD ESTABLISH A DANGEROUS PRECEDENT TO EXERCISE ORIGINAL JURISDICTION.

Given the de minimis effect that Oklahoma's Act has upon Wyoming's severance tax collection, this Court would be creating a dangerous precedent by continuing to exercise its original jurisdiction in this cause. Such a

precedent could make available this Court's original jurisdiction in any negative commerce clause case, in which the commerce affected happens to be the subject of some State tax.

The incidental, de minimis effect that Oklahoma's Act has upon Wyoming's severance tax collection is not of a "serious magnitude," and does not justify this Court's further exercise of its original jurisdiction, particularly when the Oklahoma Act may readily be challenged by the real parties in interest, the Wyoming coal producers, in state or federal district courts. Federal district courts would be available, just as they were in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977). Oklahoma State courts would also be available. Okla. Const. art. II, § 6; and Okla. Stat. tit. 12, § 16-1. Thus the issues presented could be litigated in other forums.

For the reasons set forth above, the State of Oklahoma respectfully submits that this Court's continued exercise of its original jurisdiction in this case would, under the facts developed, not be appropriate.

PROPOSITION II

THE STATE OF WYOMING LACKS THE REQUISITE STANDING TO CHALLENGE OKLAHOMA'S ACT ON COMMERCE CLAUSE GROUNDS BECAUSE:

1. **WYOMING IS NEITHER A PARTICIPANT IN THE COMMERCE AFFECTED BY THE ACT, NOR A CONSUMER AFFECTED BY THE ACT; AND**

2. **THE INDIRECT, DE MINIMIS IMPAIRMENT OF WYOMING'S COAL SEVERANCE TAX REVENUES, IF ANY, DOES NOT CONSTITUTE SUFFICIENT INJURY TO SUPPORT STANDING.**

OKLAHOMA'S ACT DOES NOT AFFECT COMMERCE ENGAGED IN BY WYOMING, OR WYOMING'S CONSUMER INTEREST.

Wyoming's standing to sue is based on the assertion that Oklahoma's Act results in lost coal sales by the eight companies that have sold Wyoming coal to Oklahoma's four utilities. Wyoming's standing is predicated on the premise that lost coal sales in Oklahoma result in a loss of Wyoming's coal severance tax revenues.

This injury alleged loss of tax revenue is not the type of direct injury that this

Court has recognized when a state is itself engaged in the commerce affected, or is affected as a consumer.

In Oklahoma v. A. T & Santa Fe Ry Co., 220 U.S. 277 (1911), the State of Oklahoma attempted to bring an action in this Court against a railroad, alleging certain rate overcharges to its citizens. The Court refused to accept jurisdiction and found that the real controversy was between the railway company and certain Oklahoma citizens who shipped by rail. Since the State of Oklahoma was not shipping goods in its governmental capacity, it could not invoke the original jurisdiction of the Court.

The State of Wyoming's attempted challenge in this case is similar to what the State of Louisiana attempted to do in Louisiana v. Texas, 176 U.S. 1 (1900). That case arose out of a quarantine that a Texas State Health Officer placed on all

goods imported from New Orleans, Louisiana. The quarantine was apparently rationalized by fear of yellow fever outbreaks. This Court first pointed out that its original jurisdiction was only appropriate where a controversy existed between two states, not where a state was merely trying to vindicate the grievances of particular individuals.

This Court did not take original jurisdiction of the matter, pointing out that states have no special position to vindicate interstate commerce claims when they are not engaged in the commerce. Id. at 19.

If a direct controversy exists over the Oklahoma Act, it is between the State of Oklahoma and the companies which mine coal in Wyoming and sell coal to Oklahoma utilities. The State of Wyoming is not selling coal to Oklahoma utilities and is not a participant in the type of commerce

which they allege is being injured by Oklahoma's Act.

THE INDIRECT, DE MINIMIS EFFECT, IF ANY, ON WYOMING'S TAX COLLECTION INTEREST IS NOT SUFFICIENT INJURY TO SUPPORT STANDING.

Even if Wyoming might conceivably lose tax revenues, such an indirect and derivative injury has not been recognized as a sufficient basis for standing by a state. For a true controversy to exist between two or more states it must be apparent that the Plaintiff State is suffering some direct injury from the action of the Defendant State. Maryland v. Louisiana, 451 U.S. 725, 735 (1981); Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976); Massachusetts v. Missouri, 308 U.S. 1, 15 (1939). As the this Court, in Maryland v. Louisiana, 451 U.S. at 736, stated:

> Standing to sue, however, exists for constitutional purposes if the injury alleged "fairly can be traced to the

> challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." [citations omitted.]

The State of Wyoming's theory of standing in this case is based on an asserted economic injury to a handful of its taxpayers. Under Wyoming's theory, any party injuring its taxpayers injures Wyoming because it will collect less taxes.

While no U.S. Supreme Court case has been found directly addressing this theory of standing, lower court decisions directly discussing this theory of standing have rejected it.

In Commonwealth of Pennsylvania v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976), cert.den. 429 U.S. 977 (1976), the State of Pennsylvania sued the Small Business Administration, challenging that agency's classification of certain hurricane damaged areas as "Class B" disaster areas.

Pennsylvania claimed that its tax revenues and economy were damaged by the mistaken classification. The Court of Appeals rejected this vicarious injury as a basis for standing. The Court first pointed out that the State's asserted injury would be no different from other individuals or businesses that could be hurt by a general injury to businesses and the economy:

> The allegation that tax revenues were reduced embodies a comprehensible harm to the economic interests of the state government. However, it appears to us likely that this is the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing. The parallel to the cases imposing very strict limits on taxpayer standing is imperfect, since it can not be said of the state that its economic interest is no different than those of many others.

533 F.2d at 672.

The Court went on to hold that a state must show a direct injury to its status as a tax collector before it may legitimately bring an action for damage to its tax revenues.

> . . . [I]mpairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing. By analogy to the taxpayer standing cases, it seems appropriate to require some fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged. This would prevent state standing in cases like the present one, where diminution of tax receipts is largely an incidental result of the challenged action. [Emphasis Added]

533 F.2d at 672. In the instant case, Oklahoma's Act does not directly affect the State of Wyoming's power to levy or collect its severance tax. Rather, Wyoming attempts to rely on a derivative injury to its severance tax revenues resulting from

alleged injury to the coal companies which sever the coal. Under the rationale used by the D.C. Circuit Court of Appeals, Wyoming clearly has no standing to bring this action.

The Court of Appeals for the Eighth Circuit relied on the reasoning of the court in Kleppe to find that the State of Iowa had no standing in State of Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985), cert. den. 478 U.S. 1012 (1986). In this case, the State of Iowa along with individual farmers sued the Federal Agriculture Department and its Secretary, asking the court to order the implementation of three federal agricultural disaster relief programs. The state asserted that failure to implement these programs would result in lower tax revenues, higher unemployment and higher welfare costs. The court held as follows:

> From these cases, we conclude that the State's alleged injury is insufficiently proximate to the actions at issue and the remedy to be offered by this action an insufficient guarantee of solvency to warrant state standing in this case.

771 F.2d at 354.

In the case at hand, the tax revenue interest asserted by Wyoming is far less than those involved in Block, which were not found to be sufficient. Wyoming's interest does not involve the general lowering of tax revenues, but rather only the de minimus lowering of one specific tax, which would have far less of an impact on the state than the general lowering of all of its taxes.

In sum, the State of Wyoming lacks a direct-commerce-participant or consumer interest in the commerce alleged to be affected by Oklahoma's Act. The incidental, de minimis tax revenue interests asserted, under the facts in this

case, do not constitute sufficient injury to support Wyoming's standing to challenge Oklahoma's Act on Commerce Clause grounds.

PROPOSITION III

OKLAHOMA'S ACT ADVANCES LEGITIMATE LOCAL PURPOSES THAT CAN NOT ADEQUATELY BE SERVED BY REASONABLE NON-DISCRIMINATORY ALTERNATIVES.

GOAL OF ACT

In adopting Oklahoma's Act, Oklahoma sought to lessen its utility companies' reliance on a single source of supply, primarily shipped by one railroad company, and further sought to lessen the potential harm to their consumers caused by energy supply cutoffs. (Wy Exhibit G, Answer to Interrogatory No. 2; OK Appendix, 60a).[4]

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[4] Reliance on two concurrent resolutions -- one adopted the session before Oklahoma's Act, and the other two sessions later -- to interpret Oklahoma's Act is misplaced. In Oklahoma, such a legislative resolutions are merely an expression of opinion and have no force or effect of law. Hawks v. Bland, 9 P.2d 720 (Okla. 1932). Only measures passed by both houses of the Legislature and then signed by the Governor become law in Oklahoma. Oklahoma News Co. v. Ryan, 224 P. 969 (Okla. 1924). Neither resolution is part of the Act's legislative history, and one Legislature can not interpret the acts of another. Stephens Produce Co. v. Stephens,

ACT'S REDUCTION OF DANGEROUS RELIANCE ON EXPENSIVE AND LIMITED RAILROAD TRANSPORTATION.

When Oklahoma's Act went into effect, all of Wyoming coal destined for Oklahoma was shipped out of Wyoming on one railroad. (Stipulation, para. 28; WY Appendix, A-18). As noted above, the cost of transporting Wyoming coal to Oklahoma by railroad constitutes between 45% and 76% of the cost of the delivered price of Wyoming coal. While Wyoming emphasizes that Wyoming coal is cheaper to mine than Oklahoma coal, Wyoming fails to recognize that it is not the price of mined coal, nor the free-on-board price at the mines that is the important price to a utility (OK Exhibit G, Affidavit of David Weinstein,

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332 P.2d 674 (Okla. 1958). Additionally, resolutions are ordinarily passed without the consideration required in passing laws. Hawks v. Bland, 9 P.2d 720, 721 (Okla. 1932).

para. 10; OK Appendix, 23a). Rather, the important price criterion for a utility is the delivered price in cents per million BTU's (Id.). As it is the delivered cost of fuel that is important to utilities, and the cost of delivering Wyoming coal to Oklahoma constitutes between 45% and 76% of the cost of delivered Wyoming coal, it was appropriate that the Oklahoma Legislature, in the interest of their utility consumers, was concerned with the high railroad transportation cost of Wyoming coal.

Given the fact that at the time of the Act's passage one railroad delivered all Oklahoma coal, it was also appropriate for the Oklahoma Legislature, in the interest of Oklahoma's consumers, to seek to lessen reliance on a single source of coal, shipped over a single railroad. We need think back but a very few years to the oil embargo, with its fuel shortages, long lines at the gas pump, and stalled

industries, to remember the burdens and hardship that dependance on a single source of energy can cause.

ACT'S REDUCTION OF PRESENT AND FUTURE COAL CUTOFFS AND CONSERVATION OF CLEAN-BURNING COAL FOR FUTURE USE.

Though Oklahoma's Act certainly cannot eliminate the State's reliance on coal shipped primarily from one source by one transporter, it can and does reduce such reliance. The Act allowing Oklahoma stock piles of Wyoming coal to last 10% longer, should a catastrophe such as a rail strike occur.

In addition to immediately reducing Oklahoma reliance on a single coal source, Oklahoma's Act also conserves Wyoming's clean-burning coal for the future. If Oklahoma's utilities were to exclusively use clean-burning, low-sulfur Wyoming coal, that supply of needed energy would be much more quickly dissipated and made

unavailable. Oklahoma's Act, by requiring that 10% of Oklahoma coal - coal which, with its much higher sulfur content, could not be a primary source of supply - conserves the cleaner coal for future use by Oklahoma utilities. This requirement, like burning 10% alcohol with gasoline, conserves the primary fuel reserves for future generations. Conserving primary fuel sources for future use and limiting reliance on one source of fuel are legitimate local concerns.

THE ACT FOSTERS LEGITIMATE STATE PURPOSES THAT CANNOT BE ADEQUATELY SERVED BY A REASONABLE NON-DISCRIMINATORY ALTERNATIVE.

The Commerce Clause, in granting Congress the right to regulate commerce among the states, also places limitations on the states' ability to burden or interfere with interstate commerce. Maine v. Taylor, 477 U.S. 131 (1986). This limitation on the states' power, however,

does not prevent a state from regulating matters of legitimate local concern. Maine v. Taylor, 477 U.S. at 138; and Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 350 (1977).

As noted by amicus curiae, this Court held in New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274, that "[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstratively justified by a valid factor unrelated to economic protectionism." In the instant case, Oklahoma must demonstrate that its Act advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. Id. at 278.

In the case at hand, there is a reason for treating Oklahoma coal in a different manner from Wyoming coal. As noted above, the stipulated facts clearly demonstrate

that there is a marked difference between the physical characteristics of Wyoming and Oklahoma coal. While Wyoming coal is low in sulfur and clean-burning, Oklahoma coal is high in sulfur and less clean-burning. On the other hand, Oklahoma coal has a high BTU rating, while Wyoming coal has a much lower BTU rating. On average, it takes a ton-and-a-half of Wyoming coal to equal the BTU ratings of but one ton of Oklahoma coal.

Given environmental considerations, Oklahoma coal could not be used as a primary utility fuel, because of its high sulfur content, since the burning of high sulfur coal in high percentages would pollute the environment. Thus, given today's technology, the primary coal sources must be clean-burning, low sulfur coal, such as Wyoming's coal.

Given the necessary reliance on clean-burning coal, the state has a legitimate

interest in seeing that clean-burning coal is conserved so as to be available for future use. Oklahoma's Act accomplishes that very purpose.

Because of the high cost of transporting Wyoming coal, and the differing sulfur content of Wyoming and Oklahoma coal, there is no other viable means of extending the available life of Wyoming's clean-burning coal than to use local coal. Use of local coal to supplement Wyoming coal eliminates unnecessary costly transportation, and takes advantage of the high sulfur physical characteristic of the local coal.

Oklahoma respectfully submits that its challenged Act should be upheld, as it advances legitimate local purposes that cannot be adequately served by reasonable alternatives.

PROPOSITION IV

THE REQUIREMENTS OF OKLAHOMA'S ACT ARE WITHIN THE "LAWFUL AUTHORITY" OF A STATE TO REGULATE INTERSTATE UTILITY RATES, AND ACCORDINGLY DOES NOT VIOLATE THE COMMERCE CLAUSE.

Since 1935, with the creation of the Federal Power Commission, Congress has specifically delineated the extent to which states may regulate public utility companies and the rates charged to consumers. Federal jurisdiction over public utilities generating electricity is now vested with the Federal Energy Regulatory Commission. 16 U.S.C. § 824 (1982). This statute provides in pertinent part as follows:

> (1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy . . .

(Emphasis added.) 16 U.S.C. § 824(b)(1982).

Between 1935 and 1983, the line between state and federal jurisdiction was quite clear. The states had jurisdiction over retail rates charged to its citizens and the federal government had jurisdiction over wholesale rates charged by utility companies. In Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983), this Court recognized a state's broader jurisdiction over public utility companies generating electricity within its borders. In that case this Court upheld Arkansas' jurisdiction over wholesale rates of the Arkansas Electric Cooperative.

Even though allowing Arkansas to regulate wholesale rates had some effect on interstate commerce, this Court noted that the state's traditional role in regulating

public utilities had no negative impact on the nation's commerce.

> Finally, although we recognize that the PSC's regulation of the rates AECC charges to its members will have an incidental effect on interstate commerce, we are convinced that "the burden imposed on such commerce is not clearly excessive in relation to the putative local benefits." Part of the power AECC sells is received from out-of-state. But the same is true of most <u>retail</u> utilities, and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States.

461 U.S. at 395.

Another case demonstrating this Court's deference to the State's control over its domestic utility companies is <u>Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission</u>, 461 U.S. 190 (1983). California had passed a statute which forbid the construction of new nuclear power plants until one of its agencies made

a finding that there were adequate storage facilities for nuclear waste. Federal law clearly vested nuclear safety concerns with the federal government. California asserted that it was not trying to regulate nuclear power but was simply concerned that without adequate storage facilities its ratepayers would ultimately bear the burden of increased costs of disposing of the waste. This Court found that California's statute was not preempted by federal law and found that California's action was justified by the states' long-recognized regulation over its own utilities.

In discussing the legislative history of the Federal Power Act, the Court observed the following:

> Early on, it was decided that the States would continue their traditional role in the regulation of electricity production.

461 U.S. at 194. This Court went on to point out that states historically

regulated utility companies closely and had clear authority to decide the economic feasibility of the operations of these utilities and control over their rates and services. Quoting from its previous opinions this Court stated as follows:

> "The nature of government regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body." [citations omitted] ("The State's concern that rates be fair and efficient represents a clear and substantial government interest"). . . [T]hese economic aspects of electrical generation have been regulated for many years and in great detail by the States.

461 U.S. at 205-206.

A state has every right to regulate the fuel source of its domestic utilities. As this Court noted in Pacific Gas & Electric Company v. The State Energy Resources Conservation and Development Commission,

461 U.S. 190, at 202, quoting from Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557, 569 (1980), a regulation of domestic utilities and the rates charged to its citizens ". . . represent a clear and substantial governmental interest."

A state does not have to sit idly by and watch utility companies become too dependent on a fuel source, or a single transporter of the fuel. Nor is a state prohibited from insuring that needed fuel supplies are conserved. It is the Oklahoma ratepayer who will pay for the over-dependence and non-conservation. Just as California did in Pacific Gas & Electric Company, Oklahoma has passed a statute to protect its utility ratepayers.

As previously stated, 16 U.S.C. § 824 (1982) essentially carves out jurisdiction over certain electric utility matters and gives it to FERC. The federal government

(through FERC) has no power to prescribe retail electric rates charged by electric utility companies. Federal Power Commission v. Conway Corp., 426 U.S. 271, 276 (1976). All other matters in the regulation of electric utilities are left to the states.

In order to regulate the retail rates charged by domestic utility companies to its citizens, the State of Oklahoma must insure that its utility companies do not become overly dependent on a source of supply or on a fuel transporter. Reliance on coal from distant supply sources, shipped by one rail company, could eventually lead to an uncomfortable reliance on the prices charged by those companies. This very legitimate concern about supplies being cut off by an out-of-state producer was recognized as a legitimate concern in Panhandle Eastern Pipe Line Co. v. Michigan Public Service

Commission, 341 U.S. 329, 333-334 (1951).

The regulation of domestic public utilities and the rates they charge consumers is unlike other forms of state regulation because utilities are really regulated monopolies. The Oklahoma consumers do not have a choice as to where Oklahoma utilities purchase their coal.

In Oklahoma, the goal of utility regulation is to insure the lowest possible utility rates for its ratepayers by preventing needless duplication of facilities that could result in increased cost to these ratepayers. See Data Transmission Co. v. Corporation Commission, 561 P.2d 50, 54 (Okla. 1977). This Court has recognized that ". . . the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Electric Cooperative, 461 U.S. at

377. In Panhandle Eastern Pipeline Co., 341 U.S. 329 (1951), this Court upheld the State of Michigan's action in preventing an out of state pipeline company from directly selling to its consumers without a certificate of need. This Court recognized the long standing principle that the sale of gas or utility service to local customers is essentially a local concern and subject to state regulation.

This Court also recognized that the absence of regulation in the public utility arena can ultimately result in higher cost to ratepayers. The holding in New England Power Company v. New Hampshire, 455 U.S. 331 (1982) does not dictate a contrary finding. In that case, New Hampshire tried to argue that Congress had expressly authorized states to ban completely the exportation of hydroelectric power because part of the Federal Power Act provides that it "shall not . . . deprive a State or

State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."

That phrase limits its operation to the existing "lawful authority" of the state. When the Federal Power Act was passed in 1935 a complete ban of hydroelectric power was almost assuredly unlawful. Id. at 342, 343. As recognized in Pacific Gas & Electric Company, however, the states' regulation over the operations of its utilities and the rates they charged was pervasive when the Federal Power Act was passed. Id. at 194.

In Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329, 336-337 (1951), this Court upheld a state regulatory scheme under which an interstate natural gas was required to obtain a certificate of necessity to sell gas in state. There, this Court held that

such registration was not precluded by Federal statute and the requirement, though it could have resulted in a total denial of the certificate, was well within the state's power to regulate. In short, this Court held such potentially prohibitory regulation was within the lawful authority of the state. Being within the lawful authority of the State, it was not be found to be violative of the Commerce Clause.

The State of Oklahoma has determined that effective and helpful ways of ensuring lower local utility rates include 1) reducing over-dependence on a single source of supply, a single fuel transporter, and 2) conserving needed low-sulfur coal for the future. To accomplish these goals Oklahoma requires Oklahoma based utilities to burn a small percentage of Oklahoma coal but only if it is cost effective. This minimal requirement is well within Oklahoma's authority to regulate retail

rates of electric utilities. Oklahoma's Act is not violative of the Commerce Clause.

PROPOSITION V

EVEN IF OKLAHOMA'S ACT WERE FOUND TO DISCRIMINATE IMPROPERLY AGAINST INTERSTATE COMMERCE, THE ACT WOULD STILL BE CONSTITUTIONALLY APPLIED TO THE GRAND RIVER DAM AUTHORITY, A STATE OWNED PUBLIC UTILITY, UNDER THE MARKET PARTICIPANT DOCTRINE.

The jurisdiction of FERC does not generally extend to the states' authorities or instrumentalities of states, unless a specific provision brings them under FERC jurisdiction. 16 U.S.C. § 824(f) (1982).

The Grand River Dam Authority is a state owned and operated agency. Okla. Stat. tit. 82, § 861; (Stipulation, para. 30; WY Appendix, A-19). One of the coal fired electric plants affected by Oklahoma's Act is the state owned utility, the Grand River Dam Authority.

This Court has long recognized the difference between states acting as market participants and as market regulators. When the State of Oklahoma makes purchases

of coal through its agency, the Grand River Dam Authority, it may favor Oklahoma producers in making such purchases. In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), this Court dealt with a case in which the State of South Dakota temporarily confined its sales of cement at a state owned cement plant to state residents. In upholding South Dakota's preference for its own residents, this Court held as follows:

> The basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place. [citations omitted.] There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. [Emphasis Added]

447 U.S. at 436, 437. See also White v. Massachusetts Council of Construction

Employers, Inc., 460 U.S. 204 (1983); and Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

It is interesting to point out that the State of Wyoming successfully defended its own state purchasing preferences for its own citizens recently in State v. Antonich, 694 P.2d 60 (Wyo. 1985); and Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital, 641 P.2d 745 (Wyo. 1982).

Thus, even if Oklahoma's Act may not be constitutionally applied to privately owned utilities, it is certainly constitutional as applied to coal purchases of the Grand River Dam Authority, a market-participant. Accordingly, even if Oklahoma's Act were found to be unconstitutional, it could, because of the presence of a severability clause, be applied to the Grand River Dam Authority, under the market-participation exception.

Oklahoma jurisprudence has long recognized that legislation, while invalid and inapplicable to one class, may be constitutional as applied to another:

> Partial invalidity of an act does not necessarily destroy the entire act. It is a familiar rule of law that an act of the Legislature, while invalid and inoperative as to one set of facts, may be constitutional and valid as to another and different state of facts.

State v. Waterfield, 29 P.2d 24, 27 (Okla. 1934).

More recently, in Attorney General Opinion No. 83-235; 15 Okla. Atty. Gen. Op. 446, 452 (1983), the Attorney General stated:

> Where a statute on its face is applicable to several classes of persons or cases, the constitutionality of the statute as applied to one class may be upheld at the same time as its applicability to other classes is stricken down as unconstitutional. When such a situation arises the statute is only entirely void where it is clear that the statute would

> not have been passed at all except in its entirety or if the legislative intent would be defeated by including some classes and excluding others. Sands, Sutherland Statutory Construction, § 44.18 (4th ed. 1973); Keniston v. Board of Assessor's of Boston, 407 N.E. 2d 1275, 1295 (1980); Farmer's Loan & Trust Co. v. New York Cent R.R., 236 N.Y.S. 250, 254 (1928).

In adopting Oklahoma's Act, the Legislature made it clear that it intended the Act's application to be severable:

> "The provisions of this Act are severably and if any part provision shall be held void the decision of the Court so holding shall not effect or impair any of the remaining parts or provisions of this Act." 1986 Okla. Sess. Law, Ch. 43, § 3, 74.

As demonstrated above, even if Oklahoma's Act is unconstitutionally applied to private utility companies, it may still lawfully be applied to GRDA as a market participant. Given 1) the presence of a severability clause in Oklahoma's Act 2) Oklahoma's adherence to the rule of law

that a statute as applied to one class may be upheld at the same time that its applicability to other classes is stricken down as unconstitutional, 3) the Act may clearly be applied to GRDA, as a market participant, and 4) application of the Act to GRDA furthers the purpose of the Act, Oklahoma's Act is applicable to GRDA, even if, under the Commerce Clause, it can not be applied to privately owned utilities.

CONCLUSION

The State of Oklahoma prays that this Court not accept or adopt any recommendations or conclusions of the Special Master inconsistent with the views expressed herein, and that this Court dismiss this case on the grounds that the case presented, under the facts developed, does not warrant continued exercise of this Court's original jurisdiction.

Alternatively, the State of Oklahoma asks that this Court dismiss this case on the grounds that the indirect, de minimis impairment, if any, of Wyoming's coal severance tax revenues, does not constitute sufficient injury to support standing in this case.

If the case is not dismissed, and is instead addressed on the merits, Oklahoma asks that the Court find that Oklahoma's Act is within the State's lawful authority, and not violative of the Commerce Clause.

Finally, should this Court find that the application of Oklahoma's Act to private utilities violates the Commerce Clause, Oklahoma asks that this Court find that Oklahoma's Act may nevertheless be applied to State owned utilities under the market participant doctrine, as such application is consistent with the severability clause contained in Oklahoma's Act, and with long recognized Oklahoma law that a statute

applicable to several classes may be upheld at the same time as its applicability to another class is stricken down as unconstitutional.

Respectfully submitted,

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No. 112, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

ORIGINAL ACTION

APPENDIX TO BRIEF ON THE MERITS FOR THE STATE OF OKLAHOMA

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OKLAHOMA'S EXHIBIT "A"

IN THE SUPREME COURT OF UNITED STATES

October Term, 1987

STATE OF WYOMING, Plaintiff,	)	
v.	)	No 112, Original
STATE OF OKLAHOMA, Defendant.	)	

PLAINTIFF'S RESPONSE TO REQUEST FOR ADMISSIONS

COMES NOW the State of Wyoming, by Joseph B. Meyer, Attorney General for the State of Wyoming, and through Steve Jones and Mary B. Guthrie, Senior Assistant Attorneys General, and for their response to the Defendant's request for admission hereby submits the following:

1. Wyoming's coal severance tax is assessed on the basis of the amount of coal

mined or produced and not on the amount of coal sold.

RESPONSE:

Denied, based upon the phraseology used. The Plaintiff admits, however, that Wyoming's coal severance tax is assessed on the current and continuing privilege of severing or extracting coal in the State of Wyoming. The value of the privilege is based on the amount of coal mined or produced.

2. Wyoming's coal severance tax is assessed against the persons mining or producing coal in Wyoming and is not assessed against Oklahoma utility companies.

RESPONSE:

The Plaintiff admits that its coal severance tax is not assessed against Oklahoma utility companies. The Plaintiff denies the rest of the sentence, due to phraseology used, but admits that Wyoming's

coal severance tax is assessed against the person or persons extracting or severing coal in the State of Wyoming.

3. Wyoming exercise tax on the extraction of coal under Wyo. Stat. § 39-6-302(a)-(f)(Supp. 1985) is based on a percentage of the value of the coal severed.

RESPONSE:

Admitted.

4. The amount of the Wyoming excise tax on the extraction of coal is determined by multiplying the applicable statutory percentage by the market value of the coal, which value is determined at the time of severance.

RESPONSE:

The Plaintiff admits that the amount of the Wyoming excise tax on the extraction of coal is determined by multiplying the applicable statutory percentage by the fair cash market value of the coal. The

Plaintiff denies that the value is determined at the time of severance. However, the Plaintiff admits that the fair cash market value of the coal is determined at the mine or mining claim where produced, after the mining or production process is completed. (See W.S. 39-2-202(a).)

Respectfully submitted this 30th day of May, 1989.

Steve Jones
Senior Assistant
Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

Mary B. Guthrie
Senior Assistant
Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

CERTIFICATE OF SERVICE

I, Steve Jones, hereby certify that I served a true and correct copy of the foregoing PLAINTIFF'S RESPONSE TO REQUEST FOR ADMISSIONS by depositing a copy of the same in the United States Mail, postage prepaid this 30th day of May, 1989, addressed as follows:

Neal Leader
Assistant Attorney General
Chief, Civil Division
112 State Capitol Building
Oklahoma City, OK 73105

_____

Steve Jones
Senior Assistant
Attorney General

OKLAHOMA'S EXHIBIT "C"

AFFIDAVIT OF MARY STAUFFER

State of Oklahoma)
) ss:
County of Craig)

I, MARY STAUFFER, being first duly sworn, depose and state as follows:

1. I am an Accounts Payable Supervisor for the Grand River Dam Authority (G.R.D.A.), which is headquartered in Vinita, Oklahoma.

2. In my capacity as Accounts Payable Supervisor, I have access to certain cost information related to the cost of coal and rail transportation for the G.R.D.A.

3. The records of the G.R.D.A. reflect that between 1981 through 1988, the cost of rail transportation ranged from 59.9% to 76.4% of the total delivered cost for coal delivered to G.R.D.A.'s plant at Choteau, Oklahoma.

FURTHER AFFIANT SAYETH NOT:

Mary Stauffer

SUBSCRIBED AND SWORN TO before me, this 24th day of October, 1989.

Notary Public

My Commission Expires:

(SEAL)

OKLAHOMA'S EXHIBIT "D"

AFFIDAVIT OF J.T. COFFMAN

State of Oklahoma)
) ss:
County of Oklahoma)

I, J.T. Coffman, being first duly sworn, depose and state as follows:

1. I am the Manager of Generation Services of Oklahoma Gas and Electric Company (OG&E), which is an Oklahoma utility company headquartered in Oklahoma City, Oklahoma. OG&E is an investor owned utility.

2. As the Manager of Generation Services I am responsible for the department of OG&E which oversees the acquisition of coal for OG&E's two coal-fired generating plants in Red Rock, Oklahoma, and Muskogee, Oklahoma. In this capacity I also supervise the acquisition of rail and transportation services for the delivery of the coal to these two facilities.

3. In my capacity as Manager of Generation Services, I have access to certain cost information related to the cost of coal and rail transportation for OG&E.

4. The records of OG&E reflect that between 1981 through 1988, the cost of rail transportation ranged from 55% to 73% of the total delivered cost for coal delivered to OG&E's plants at Red Rock and Muskogee.

FURTHER AFFIANT SAYETH NOT.

_____
J.T. COFFMAN

Subscribed and sworn to before me, this 16th day of October, 1989.

_____
Notary Public

My Commission Expires:

_____
(SEAL)

OKLAHOMA'S EXHIBIT "E"

AFFIDAVIT

State of Oklahoma)
) ss:
County of Caddo)

I, Robert A. Orme, the undersigned Affiant, being duly sworn, state the following:

1. I am employed as Manager of Power Production by Western Farmers Electric Cooperative (WFEC), a cooperative corporation duly organized pursuant to the laws of the State of Oklahoma.

2. The acquisition of coal utilized in the operation of WFEC's only coal-fired generation plant, located near Fort Towson, Oklahoma, is within the responsibility of the Power Production Division.

3. Included in the WFEC's total cost of delivered coal is rail transportation cost for coal shipped from the State of Wyoming to WFEC's plant and trucking cost for coal

shipped from mines located in Southeastern Oklahoma to WFEC's plant.

4. As reflected by WFEC's records, its cost of rail transportation for the delivery of coal ranges from 50% to 70% of the total delivered price of coal delivered to its Fort Towson plant from the State of Wyoming during the years 1982 through 1988.

FURTHER, AFFIANT SAITH NOT.

_____
Robert A. Orme

Subscribed and sworn to before me this 20th day of October, 1989.

_____
Notary Public

My Commission Expires:

_____
(SEAL)

OKLAHOMA'S EXHIBIT "F"

AFFIDAVIT OF MASOUD MAHMOUD-NEJAD

State of Oklahoma)
) ss:
County of Tulsa)

I, MASOUD MAHMOUD-NEJAD, being first duly sworn, depose and state as follows:

1. I am Director, Fuels for Public Service Company of Oklahoma (PSO), which is an Oklahoma utility company headquartered in Tulsa, Oklahoma. PSO is an investor-owned utility.

2. I am Director of the Department at PSO which oversees the acquisition of coal for PSO's Northeastern 3&4 coal-fired generating plant in Oologah, Oklahoma. In this capacity I also supervise the acquisition of rail and transportation services for the delivery of the coal to this facility.

3. In my capacity as Director, I have access to certain cost information related

to the cost of coal and rail transportation for PSO.

4. The records of PSO reflect that between 1979 through 1988 the cost of rail transportation ranged from a low of 45% to a high of 65% of the total delivered cost for coal delivered to PSO's plant at Oologah, Oklahoma.

FURTHER AFFIANT SAYETH NOT.

_____
Masoud Mahmoud-Nejad

Subscribed and sworn to before me this 9th day of October, 1989.

_____
Notary Public

My Commission Expires:

_____
(SEAL)

OKLAHOMA'S EXHIBIT "G"

No. 112, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

AFFIDAVIT OF DAVID M. WEINSTEIN

I, David M. Weinstein, being first duly sworn, depose and state as follows:

1. I have a B.A. in economics from Amherst College, a M.A. in economics from Stanford University, and a J.D. from Yale Law School. I have studied and assessed energy and coal-related issues since 1974. My resume, which includes my educational background and list of publications, is

attached to this affidavit (Exhibit A). It accurately reflects my educational background and my professional experience.

2. I have reviewed the "Stipulation of Facts" ("Stipulation") submitted on 11 August 1989 in the above-entitled matter.

3. I have also reviewed several additional documents ("the Documents") related to this matter, namely:

- "The Economic Effects of Oklahoma Statutes Title 45 § 939, Title 45 § 939.1 and Title 74 § 85.32 on Oklahoma's Electric Utilities Fuel Purchasing Decisions," written by Sam J. Flaim and Ross C. Hemphill ("Flaim/Hemphill").

- "Amicus Curiae Brief of the Wyoming Mining Association in Support of Motion of the State of Wyoming for Summary Judgment" ("Amicus").

- "Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion" ("Wyoming Motion").
- "Affidavit of Richard J. Marble" ("Marble Affidavit").

4. I have been employed by the State of Oklahoma to review the reasonableness of several statements and allegations in "the Documents" as they relate to OKLA. STAT., tit. 45, § 939 (Supp. 1986) ("the Act"). My comments focus on the following areas:

- Coal purchases by Oklahoma utilities
- Wyoming severance tax revenues
- Errors in fact, inconsistencies or misleading allegations in "the Documents."

COAL PURCHASES BY OKLAHOMA UTILITIES

5. "The Documents" incorrectly allege that "ten percent of the Oklahoma coal market has been saved for Oklahoma producers" and that "Oklahoma's utilities were forced to reduce their purchases of

Wyoming coal to 90% of their needs." (See, for example, "Amicus," p.6, last full sentence in text; "Wyoming Motion," p. 19, first full paragraph; "Wyoming Motion," p. 24, last full paragraph, first line.)

In fact, as shown in "Stipulation" (items 10 - 13), in the two full years that "the Act" has been in effect (1987 and 1988) Oklahoma's share of the Oklahoma utility market has been 5.7 percent and 5.4 percent. The remaining coal in both years, more than 94 percent of the Oklahoma utility market, was provided by Wyoming producers. In the year before "the Act" took effect, Oklahoma's share of the Oklahoma utility market was 2.1 percent. It is incorrect, therefore, to allege that "the Act" has "forced" Oklahoma utilities to reduce their purchases of Wyoming coal to "90% of their needs."

WYOMING SEVERANCE TAX REVENUES

Actions by the State of Wyoming and changes in the coal market have caused much greater reductions in severance tax revenues than any revenues that might have been lost as a result of "the Act."

6. The reduction of the severance tax rate by the State of Wyoming in 1988 had a far greater impact on Wyoming state tax revenues than any alleged impact of "the Act."

In 1988, the State of Wyoming reduced its severance tax rate on coal from 10.5 percent to 8.5 percent. (See "Stipulation," item 6, last sentence.) That year, $85,473,220 was generated from Wyoming coal severance taxes. (See "Marble Affidavit," p. 2, item 4.) Had the State of Wyoming not changed its severance tax, those potential revenues could have been $105.58 million, or over $20 million higher.

In contrast, the "Marble Affidavit" alleges (p. 2, item 7, and p. 3, item 12) that severance taxes lost in 1988 as a result of "the Act" were $542,352. Even assuming that the "Marble Affidavit" is correct in its calculation of lost severance taxes due to "the Act," the impact of the action by the State of Wyoming in decreasing the severance tax rate was approximately 37 times greater in magnitude.

7. The decline in coal market prices also had a far greater impact on the State of Wyoming's revenues than any alleged impact of "the Act" during the same period.

Wyoming's coal severance tax is based on the mine-mouth price of the coal that is produced ("Stipulation," item 5). According to U.S. government figures (Energy Information Administration, Coal Production 1987, Table C31, p. 150), the average mine price for coal produced in

Wyoming declined from $10.85 per ton in 1986 to $9.80 in 1987. This reduction price for Wyoming coal in 1987 (the first year of "the Act"), resulted in the loss of tax revenues.

According to "Marble Affidavit," Wyoming coal severance tax revenues in 1987 were $115,554,537 (p. 1, item 3). Had the average mine-mouth price of Wyoming coal not dropped from $10.85 per ton in 1986 to $9.80 in 1987, severance tax revenues would have been approximately $127.9 million, or $12.38 million higher.

Thus, over $12.38 million in "lost severance tax revenues" in 1987 could be attributed to the change in price of Wyoming coal. In comparison, "Marble Affidavit" attributes $535,886 in "lost severance taxes" to "the Act" (p. 3, item 12). Even assuming that the "Marble Affidavit" is correct in its calculation of

"lost severance taxes," the market price effect was approximately 23 times greater.

8. In any event, the "Marble Affidavit" overstates "the Act's" impact on Wyoming state revenues. In calculating that the severance tax revenues allegedly lost in 1988 as a result of "the Act" were $542,352 ("Marble Affidavit," p. 2, item 7 and p. 3, item 12), the author assumes that 100 percent of the Oklahoma coal used by Oklahoma utilities would have come from Wyoming if not for "the Act."

That ignores the fact ("Stipulation," items 10 - 13) that 1983 was the last year that Wyoming provided 100 percent of the coal used by Oklahoma facilities. In fact, even though "the Act" only became effective as of January 1, 1987, utilities in Oklahoma bought Oklahoma coal in 1984 (20,100 tons), 1985 (24,200 tons) and 1986 (255,700 tons). (See "Stipulation," items 10 - 13.)

ERRORS, INCONSISTENCIES OR MISLEADING ALLEGATIONS IN "THE DOCUMENTS"

9. "Amicus" asserts that in 1987 "Wyoming mines would likely have sold an additional 690,000 tons of coal" to Oklahoma if not for "the Act" (p. 7, first two lines). Similar allegations appear in "Marble Affidavit" (p. 2, items 5, 7, 9, and p. 3, item 12). This tonnage represents the entire amount of coal purchased by Oklahoma utilities from Oklahoma producers. "Amicus" and "Marble Affidavit" are therefore implying that Oklahoma utilities would have bought no coal from Oklahoma producers in 1987 - 1989 if "the Act" were not in effect.

This assertion ignores the buying history of Oklahoma utilities in the years before "the Act." As can be seen in "Stipulation" (items 10 - 13), Oklahoma utilities have bought <u>some</u> Oklahoma coal every year since 1983. In 1986, the year

before "the Act" took effect, Oklahoma utilities bought 255,700 tons of Oklahoma coal, or 2.1 percent of their total coal usage.

10. "The Documents" mention in several places ("Amicus," p. 5, first and second full paragraphs; Flaim/Hemphill," pp. 16-17) that Wyoming coal is much cheaper to mine than Oklahoma coal, implying that Wyoming coal is automatically preferable to Oklahoma coal. However, for utility coal purchasers the important cost criterion is the delivered price (in cents per million Btu), not the F.O.B. price nor the cost of mining. Therefore, it is necessary to compare the market price of Wyoming coal delivered to Oklahoma utilities with the delivered market price of Oklahoma coal.

11. "The Documents" assert that all Oklahoma electric utility plants "were designed to burn" ("Wyoming Motion," p. 23, second full paragraph, fourth sentence) or

"are best suited for" ("Flaim/Hemphill," p. 2, third paragraph, second sentence) Wyoming coal. In fact, the "Flaim/Hemphill" report states in another section (p. 19, second paragraph, third sentence) that "GRDA 2 ... is designed for a 50/50 blend of Oklahoma and low Western sulfur coal."

12. "Amicus" alleges or implies in several places (e.g., p. 2, lines 12 - 15; p. 3, first full paragraph, third sentence; p. 9, last paragraph) that "the Act" has, by encouraging the use of higher sulfur Oklahoma coal, made it "more difficult for the nation to solve its pressing air pollution problem." To support its argument on p. 9, "Amicus" cites "Flaim/Hemphill," pp. 18 - 21.

Yet on page 20 of "Flaim/Hemphill," the authors of that document state that all Oklahoma utilities (excluding GRDA) "can blend the higher sulfur [Oklahoma coal]

into their existing operations and still be within compliance [of the Clean Air Act]." (Emphasis added.) GRDA has one plant "that requires a scrubber to meet the standards established by the Clean Air Act." ("Flaim/Hemphill," p. 20, second full paragraphs.

FURTHER AFFIANT SAYETH NOT.

David M. Weinstein

Subscribed to and subscribed before me this 1st day of November, 1989.

Notary Public, Middlesex County Commonwealth of Massachusetts

My Commission Expires:

OKLAHOMA'S EXHIBIT "H"

No. 112, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,

Plaintiff,

vs.

STATE OF OKLAHOMA

Defendant.

**AFFIDAVIT OF JAMES S. HAMM, JR.
CONSULTING ENGINEER FOR THE DESIGN AND
CONSTRUCTION OR GRDA COAL-FIRED PLANT
UNIT NO. 2**

STATE OF OKLAHOMA)
) ss
COUNTY OF TULSA)

I, James S. Hamm Jr., being first duly sworn upon my oath, make the following statement, to wit:

1. This Affidavit is given to be used in the State of Oklahoma's Motion for Summary Judgment and Opposition to Wyoming's Motion for Summary Judgment, in the above-referenced case.

2. I am a Licensed Professional Engineer (#10425, State of Georgia; registration attained in 1976).

3. I have twenty-two (22) years of power generation experience with emphasis on Coal-Fired Utility Applications.

4. All of my opinions expressed in this Affidavit are either based on personal knowledge, public documents and other sources, all of which are reliable, and all of which are commonly used by other professionals in the engineering field to form professional opinions. While I will more fully discuss the facts supporting my opinions later in this Affidavit, I hereby make the following statements and/or opinions:

A. The Grand River Dam Authority (GRDA) Unit No. 2 was specifically designed to burn up to a 50/50 blend of Oklahoma & Wyoming coals as measured on a BTU basis. This unit would perform more efficiently when burning this blend of coal.

B. All coal-fired generating units in Oklahoma could burn a 10/90 blend of Oklahoma to Wyoming coal without violating sulfur emission requirements.

C. Some of the underlying reports upon which the "Flaim/Hemphill" report were based (specifically the GDS Associates Report on GRDA prepared for KAMO), contain flawed data provided by GRDA personnel and ignore relevant cost-saving factors resulting from the burning of Oklahoma coal. In my opinion there is no reliable data to attribute higher maintenance and operation costs to the burning of Oklahoma coal which

cannot be offset by cost-savings from burning Oklahoma coal.

D. Most of the difficulties experienced at the GRDA units are attributable to the GRDA's personnel refusal or reluctance to operate the plant as it was designed to be operated. Some of these problems and additional costs are actually caused by not burning the 50/50 blend of Oklahoma and Wyoming coal according to the design.

The Design of GRDA Unit No. 2 and its initial operation.

5. I was employed by The Benham-Group d/b/a The Benham-Holway Power Group from 1981 to the end of 1987. Benham-Holway Power Group was the design, engineering and construction management firm for the Grand River Dam Authority for their two Coal-Fired Power stations. At Benham, I was Vice President of Power Engineering for the

corporation and served as Technical Project Manager fc all design, engineering, construction and start-up activities for GRDA 2, a 520-MW Coal-Fired Station placed in commercial operation during the Spring of 1986, in Chouteau, Oklahoma. In this capacity, I directed all technical activities related to Benham's role in the project and interfaced on a daily basis with top GRDA Power Production, Engineering, Management and Staff Personnel. I attended monthly GRDA-2 Progress Meetings with the GRDA General Manager and his top staff. I regularly attended GRDA Monthly Board of Directors meetings.

6. In addition to my primary assignment as Technical Project Manager for the GRDA-2 Project, I also consulted with GRDA on operating problems relating to GRDA-1 and on the selection of coal to be burned for GRDA-2.

7. As a Consultant to GRDA on GRDA-1, I observe operating problems relating to the burning of Wyoming coal and participated in a series of corrective modifications that cost GRDA millions of dollars in additional capital costs, as well as lost power production and GRDA labor costs. Some of these problems that were corrected could have been at least partially solved by blending some Oklahoma coal with the Wyoming coal. No consideration was given by GRDA management to burn Oklahoma coal in GRDA-1, although 10,000 tons was purchased and tested in 1984.

8. From GRDA-2's conception in 1981, it was always planned for the plant to have the capability of burning up to a 50/50 blend of Oklahoma and Wyoming coal (BTU basis). The Project Conceptual Design documents, all project descriptions including bond sale prospectuses, and all

environmental licensing documents confirm the 50-50 blend criteria.

9. GRDA's engineering contract with Benham-Holway Power Group signed in 1981 acknowledges that GRDA-2 would be designed to burn a mixture of Oklahoma and Wyoming coal. As such, it was Benham's responsibility to assure that all provisions be incorporated in the plant design to assure that the GRDA-2 Power Facility could successfully burn the desired Oklahoma and Wyoming coal mixture and this was done.

10. All relevant GRDA-2 vendor equipment specifications and construction contracts included the necessary criteria to assure successful plant operation with the 50-50 coal blend and the appropriate guarantees were requested and obtained.

11. The GRDA coal handling facilities were designed to receive Oklahoma coal only by truck. No provisions were made to

receive, store, segregate, and reclaim Oklahoma coal when brought in by rail. This design criteria was based on allowing more Oklahoma suppliers the opportunity to sell coal to GRDA. After GRDA-2 became operational, this philosophy was changed and the costly truck receiving facility has been abandoned. Allowing only for coal shipments by rail greatly limits the number of potential Oklahoma suppliers since most do not have convenient rail sidings.

12. I am not aware of any effort by GRDA to burn higher percentages of Oklahoma coal (up to the 50% level) or to investigate why the plant could not handle the burning the higher percentage of Oklahoma coal. GRDA/Benham Engineering Service Contract and all equipment vendors contracts included provisions and guarantees to accommodate the 50-50 blend.

13. During GRDA-2's first years of operation, the normal series of problems

arose limiting operation. Since many of these problems concerned the Flue Gas Desulfurization System (FGD) supplied by Flakt, Inc. GRDA's experience with the higher sulfur Oklahoma coal has been hampered.

High Maintenance Costs at GRDA Attributable to Operational Errors and Wyoming Coal-Not to Oklahoma Coal

14. The problems the GRDA-2 unit has experienced with their (FGD) cannot be attributed to the use of Oklahoma coal. Most of these problems are not related to the coal. Of the operational problems related to the coal, more problems can be attributed to the higher abrasiveness of the Wyoming coal ash. This is just the opposite of the data presented in a report by GRDA dated 4-19-88 evaluating the cost of Wyoming vs. Oklahoma coal use. (This same report appears to have been used by

GDS Associates in their report upon which Flaim & Hemphill relied. The GDS Associates Report will be discussed later in this Affidavit.)

15. In the 4-19-88 evaluation, GRDA attributes higher slagging rates to the use of the blend coal as compared to burning only Wyoming coal. GRDA further stated that this is the cause of bottom ash handling system failure with high repair costs and increased maintenance. This occurrence is more likely attributable to the manner in which GRDA has chosen to burn Oklahoma coal than to the Oklahoma coal per se. Before coal is burned in a generating plant, it must be pulverized into a finer form. As confirmed in the 4-19-88 report, GRDA is feeding Oklahoma coal to only two (2) of the six (6) pulverizers. Therefore, two sets of coal burners in the furnace are introducing blended coal while the other four sets of burners are firing straight

Wyoming coal. This is not the manner in which the unit was designed to operate and slagging is the result. High slagging on the furnace walls leads to large clinkers being dropped to the bottom ash system. While this does result in increased effort on the part of operational personnel to continue to operate the bottom ash system, the total destruction of the equipment as claimed by GRDA in the 4-19-88 evaluation can only be attributed to operational error.

16. The GRDA evaluation penalized the use of Oklahoma coal because of this higher bottom ash system repair and maintenance costs. I attended several meetings with GRDA and Babcock and Wilcox (B&W), the system supplier, concerning problems GRDA was experiencing with the bottom ash system. Although advice was requested and given concerning how to handle clinkers, the continual destruction of drag chain

flight bar and crusher repair work due to burning Oklahoma coal was never discussed. The biggest problem discussed with B&W concerned build-up of ash and coal fines in the submerged chain conveyor hopper and pluggage in the various drains, chutes, pipes, closed circuit cooling lines and heat exchangers. These pluggage and build-up problems were directly attributable to the high calcium in the Wyoming coal ash. The only solution that we could come up with was increased maintenance by GRDA personnel (i.e. continuous manual cleaning) in conjunction with costly chemical treatment. Again these problems are attributable to the Wyoming coal, not the Oklahoma coal.

17. In the 4-19-88 report, GRDA attributes increased pulverizer wear to the "harder" Oklahoma coal. This is difficult to understand since the Oklahoma coal is

softer than the Wyoming coal and requires much less energy to grind.

18. Other cost and evaluation methods used by GRDA in the 4-19-88 report were erroneous and/or highly speculative.

Erroneous Statements and Flaws in the "Flaim-Hemphill Report" Prepared for Wyoming

19. I have reviewed the report "The Economic Effects of Oklahoma Statues Title 45, § 939, Title 45, § 939.1 and Title 74, § 85.32 on Oklahoma's Electric Utilities Fuel Purchase Decisions", by Sam J. Flaim and Russ C. Hemphill, dated September 11, 1989, hereafter referred to as "Wyoming Report". The Wyoming Report was attached to affidavits prepared by Mr. Flaim and Mr. Hemphill, and appear in the appendix attached to Wyoming's Motion for Summary Judgment. I make the following statement concerning the "Flaim/Hemphill Report."

20. In Section 1.0 of the Flaim/Hemphill Report, Summary and Conclusions, it is stated in Paragraph 2, Page 2 that:

> "Until 1984, Wyoming coal was the exclusive fuel used in all Oklahoma coal plants. Tests burns of Oklahoma/Wyoming coal blends were conducted in 1984 and 1985 and small purchases of Oklahoma mined coal are reflected in those years. These test samples indicated significant increase in the operating costs of these units and future purchase of Oklahoma mined coal were deferred."

21. No evidence is provided to support this conclusion. The amounts of coal burned prior to 1986 are much too small to support a finding such as this. A report prepared by United Engineers, and Constructors, Inc. for the Grand River Dam Authority in May, 1980 entitled "Future Coal Supply Study" concluded that, " The Powder River Basin and Oklahoma coals are compatible for blending in 50/50 weight ratios." (United Report, Section II, Page

3, Paragraph 3). United Engineers, is one of the largest engineering firms in the world and their partner in preparing this report was the Paul Weir Company, the premier coal consulting firm in the United States.

22. Section II, page 3, paragraph 4 of the United report states that the blend would be "no worse than either component coal from the standpoint of slagging and fouling classification." The lower moisture and higher BTU content of the Oklahoma coal will improve operations and increase efficiency while its higher ash and sulfur content represent negative factors.

23. Nine (9) Oklahoma coal generating units were constructed under the 1970 Clean Air Act, which allowed the use of low sulfur (compliance) coal as an alternate to flue gas scrubbing. Only the additional coal handling cost at the plant and the delivered cost of the coal are cost

factors, as long as the amount of Oklahoma coal blended with the Wyoming coal does not result in a sulfur dioxide emission exceeding 1.2 pounds per million BTU's of coal burned. The low sulfur Wyoming coal allows the ten (10) percent Oklahoma coal required by Oklahoma statute to be burned with a comfortable margin within the 1.2 limitation, at all nine (9) units. The Flaim/Hemphill Report concedes that the burning of Oklahoma coal has not resulted in any of the utilities violating emission standards. (Flaim/Hemphill Report, pg. 20).

24. Contrary to the Flaim-Hemphill Report, the nine (9) Oklahoma coal-fired generating units that were constructed under the 1970 Clean Air Act requirements are not "best suited for the low-sulfur subbituminous Wyoming coal". They are equally suited for a 90/10 blend of Wyoming and Oklahoma strip-mined coal. And, burning only Wyoming coal does not "result

in these nine plants meeting emissions standards with significantly lower operating costs". As long as the 1.2 pounds of So2 per million BTU's of coal burned is not exceeded, the Wyoming/Oklahoma blend does not increase the costs. Also, the blended coals do not necessarily produce more solid waste than the Wyoming coal alone for the plants that do not require flue gas scrubbing. The amount of solid waste for these plants is a function of the ash content of the coals burned.

25. The GRDA coal fired plant was constructed subject to the Clean Air Act amendments of 1977 (Regulations issued in 1979). Therefore, GRDA-2 was required to incorporate "Best Available Control Technology". (i.e. a FGD to limit So2 emissions). This was required even if low sulfur coal was the only fuel burned.

26. In Section 8.0 of the Flaim/Hemphill Report "A Discussion of Utilities Fuel Purchasing Decisions", many general statements are made with little or no substance. In the first paragraph, there is a reference to some "studies", but they are not identified. The most comprehensive study that I am familiar with that specifically addresses the feasibility of blending Wyoming and Oklahoma coal for use in Oklahoma plants is the United Engineering/Paul Weir Company study (referred to above). That study concluded it was viable to blend the two coals for use at GRDA-2 and recommended this be done. This study was performed prior to the Oklahoma legislature actions and was adopted by GRDA in 1981. Although the fuel cost escalation from 1980 through 1987, used in the United study, do not reflect the drop in fuel costs that occurred during this period, it is important that this

reduction not be interpreted as a permanent trend. Coal prices typically move up and down in response to many factors. However, over the long term, coal and rail prices have escalated at a fairly constant rate with rail prices historically increasing at a higher rate than coal prices.

27. Page 18, Paragraphs 3 & page 19, paragraph 1 of the Flaim/Hemphill Report are irrelevant as none of the Oklahoma utilities are considering the addition of expensive flue gas scrubbing equipment to meet the requirements of the Oklahoma statutes and are, in fact, not necessary to burn a 10% to 90%, Oklahoma to Wyoming coal blend. On pg. 20 of the same report Flaim/Hemphill admit that the Oklahoma coal can be burned without "scrubbing".

Flaim & Hemphill's Reliance on the GDS Associates Report Which Relied on Inaccurate or Misleading Data

28. The Flaim/Hemphill Report next presents some cost data developed by GDS Associates, Inc. for KAMO Electric. The GDS report is addressed below.

29. I have reviewed "An Assessment of the Cost of the Impact of Oklahoma Coal Legislation Upon the Production Costs of GRDA Unit 1 and 2", prepared in May, 1988 for KAMO Electric Cooperative, Inc. by GDS Associates, Inc. I have the following statements to make about this report.

30. GDS appears to have based their analysis on operating data furnished to them by GRDA. This operating data, concerning the cost of burning blend coal versus Wyoming coal alone, appears to be the same as presented by Roger Burger (GRDA) in his cost study transmitted to Robert Sullivan (GRDA) on April 19, 1988.

31. On page 14 of the GDS Report, GDS states that they have used an efficiency improvement factor of 0.5% for an 81/19

Wyoming Oklahoma blend versus Wyoming coal alone. This improved efficiency is due to less moisture being present in the Oklahoma coal as well as increased efficiency due to the Oklahoma coal being considerably higher in BTU content. This efficiency improvement is approximately one-half of what it should be. Foster Wheeler's boiler design originally specified a boiler efficiency of 88.95 per cent when generating 3,700,000 pounds of steam at design condition with a 50/50 blend. When burning performance Wyoming coal alone the boiler efficiency was reduced to 86.22 per cent. This presents a difference of 2.73 percent between 50/50 Wyoming/Oklahoma and Wyoming coal alone. (Foster Wheeler later increased their efficiencies approximately 0.5 percent for both cases by adding four (4) additional loops of economizer surface. However, the percent difference of 2.73 remained the same). A straight line

interpretation of 20/50 (2.73) = 1.09 percent. This is more than double the value given by GRDA to GDS, Inc. Using the approximate annual fuel cost for GRDA-2 of $25,520,327, an efficiency increase of 1.09 percent has an annual value of $278,172.00. The additional 0.59 percent represents a savings of $150,570.00 not considered by GDS.

32. One explanation for the difference in the efficiency GRDA is experiencing versus what is expected is the manner in which GRDA has elected to operate the boiler. Contrary to the design philosophy of the plant and the design criteria followed by Foster Wheeler to optimize GRDA-2 boiler operation, GRDA blends the Oklahoma coal with the Wyoming coal in only two (2) of the plant's six (6) pulverizers. The plant was designed to blend the coals in all pulverizers. This variation in fuels introduced to the furnace is

responsible for the greater than expected slagging, with resulting heavy slag falls to the plant bottom ash system. This was pointed out to GRDA plant management by Foster Wheeler experts at a meeting in Chouteau, Oklahoma on January 30, 1987 but GRDA continues to operate the unit in the off-nominal manner.

33. Although GRDA has elected not to burn Oklahoma coal in the GRDA-1 boiler, the Unit 1 and 2 boiler are essentially the same design and blending some percentage of Oklahoma coal would also result in a boiler efficiency increase for GRDA-1.

34. On page 5, GDS attributes an additional $486,000.00 lime cost to the 81/19 blend. This appears to be high based on a $52.00 per ton lime cost (given by GRDA at the May, 1988 board meeting as cost of lime) and the assumed operation of GRDA-2 at an annual capacity factor of 55 percent. The GRDA-2 FGD was tested at 400

MW (approximately 75 percent load) in 1987. Approximately six (6) tons per hour of lime was required to remove 87.8 percent of the sulfur dioxide produced when burning a 50/50 blend of Wyoming and Oklahoma coals. The FGD was specified and tested to remove a minimum of 85 percent So2. However, the actual So2 removal requirements are a function of the coals burned. When using an 80/20 blend, a removal efficiency of 70 percent is required for the blend of Wyoming and Oklahoma coals used at the GRDA. For this removal rate, only about 2.4 tons of lime per hour should be required. For the assumptions used by GDS, the total annual cost of lime if burning an 80/20 blend should be approximately $820,000.00. This is considerably less than the $1,300,795.00 dollars attributed against the blend coal by GDS to evaluate busbar costs. Likewise, this $486,000.00

cost difference between the 81/19 blend Wyoming coal should be reduced.

35. While there is no question that the higher sulfur blend will require some additional lime, GRDA's lime costs are too high and may be explained by the manner in which GRDA elects to operate the flue gas scrubber. The plant was designed to operate with all four (4) FGD modules in service but with the capability, when necessary, to maintain full load with one (1) FGD module out of service. The FGD guarantees and performance tests were based on four (4) modules in service. To operate at high plant load continuously with only three (3) modules in service subjects the FGD equipment to additional wear and tear, increases the pressure drop through the FGD system, and increases the potential to wet the FGD vessel walls, increases the amount of water carried over to the precipitator

and greatly increases induced fan horsepower.

36. The GDS Report, based on information from GRDA, has attributed additional annual FGD maintenance costs of $288,000.00 to the use of Oklahoma coal. This compares to GRDA's (Burger report, dated 4-19-88) claims of additional cost of $769,500 for each 3,750 hours of operation. GDS bases their value on the fact that the 81/19 blend coal requires more lime flowing through the atomizers. GDS specifically excludes consideration of the abrasiveness of recycled fly ash, a significant exclusion considering the high abrasiveness of the Wyoming fly ash.

37. A technical paper, "The GRDA Unit Dry FGD System: Performance and Operating Experience," presented at the EPA's 10th Symposium on FGD in October of 1988, on page 16 under the section titled "Atomizers" attributes atomizer problems to

poorly assembled lube oil piping and high speed bearing failures due to dirty lube oil. On page 17, same section the paper states "atomizer disk wear rates are influenced by recycled ash composition and ash quantity. The Powder River coal used at the GRDA has a very abrasive ash. The GRDA system utilizes a very high recycle ash quantity to reduce lime costs. For the purpose of economic use of lime, GRDA chose to operate with double the design recycle rate, and accepted the degradation in the disk wear rate. These two factors require regular maintenance of the atomizer nozzles and wear plates." This paper was authored by GRDA and FLAKT (The FGD Supplier) management personnel.

38. While the burning of Oklahoma coal may require more lime in the desulfurization process, these costs of GRDA are almost entirely offset by the fuel saved when burning Oklahoma coal due to the

increase in boiler efficiency. Again, the efficiency saving figures used by GDS are less than they should be. These values indicate either poor operating practices or errors in GRDA's calculations. The FGD atomizers require more operating horsepower when blend coal is used but this is not a straight-line relationship since less water is required when burning Oklahoma coal. This is due to a reduction in the total gas flow when burning the higher BTU, more efficient blend fuel.

39. Burning blend coal also substantially reduces the forced draft and induced draft fan horsepower due to reduced gas flow through the boiler and the FGD. This is a significant cost-savings factor which has not been considered by either GRDA or GDS in calculating plant busbar costs. Rather than benefitting from this savings derived from burning Oklahoma coal, GRDA's inefficient operating procedure of

using only three (3) FGD vessels at high loads increases fan horsepower even more due to the increase in pressure drop that must be overcome with fan energy.

40. GRDA's manner of operating the boiler with only two (2) pulverizers blending Oklahoma coal increases boiler slagging, increases soot blowing requirements, reduces heat transfer in the boiler, increases fuel requirements and increases pressure drops. All of these factors affect plant busbar costs.

41. While GRDA has experienced major problems with the FGD atomizers, there is no indication that this is related to the use of Oklahoma coal. GDS' assumption that FGD maintenance is a function of total lime used, ignores the actual facts. The FGD atomizers initially failed due to faulty installation of lube oil components leading to bearing failures. These problems were corrected. Other problems are attributable

to GRDA's lack of experience and the use of Wyoming coal. GRDA has lacked experienced operating and maintenance personnel related to the FGD system. This has been a major problem. The problem of accelerated wear of FGD atomized components is due to GRDA's higher than design recycle rate and the abrasiveness of Wyoming coal ash in the recycle products.

42. Neither GRDA nor GDS has addressed wall shedding. This was a major problem in the initial operation of the GRDA-2 FGD and is a continuing maintenance problem at present. It has been reported that work crews require an average of 10 hours per month to manually clear large pieces of hardened slurry falling from the reactor walls. Wall buildup is attributed to over spraying and wetting the reactor walls. Buildup accelerates when Wyoming coal is used by itself due to the lower density

slurry (less lime, more water) used during this mode of operation.

43. While GDS's report is professionally done its underlying reliance on GRDA for operational and maintenance cost data renders it highly biased against the use of the Oklahoma coal.

FURTHER AFFIANT SAITH NOT.

DATED: November 2, 1989

BY: _____
James S. Hamm, Jr.

Subscribed and sworn to before me this 2nd day of November, 1989.

_____
Notary Public

My commission expires:

_____

WYOMING'S EXHIBIT "G"

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 112, Original
	)	
STATE OF OKLAHOMA,	)	
	)	
Defendant.	)	

OKLAHOMA'S RESPONSE TO WYOMING'S INTERROGATORIES

The State of Oklahoma, by and through Neal Leader and Thomas L. Spencer, Assistant Attorneys General, respond to the interrogatories submitted to the State of Oklahoma, as follows:

INTRODUCTION

The government of the State of Oklahoma has in excess of 600 distinct agencies.

There are also in excess of 50,000 state employees. It would be impossible to canvass each and every one of these state employees and agencies to respond to these interrogatories. The undersigned counsel has contacted and consulted with the agencies which were believed to be the most likely to possess the requested documents. The agencies contacted were the State Mining Department, Commerce Department and the Grand River Dam Authority. We have also attempted to obtain responses from the three private utilities in the State of Oklahoma and the Association of General Contractors which represents most of the coal mining companies in the State of Oklahoma. These interrogatories are limited to the information received by the three state agencies and material voluntarily supplied by the private utilities. If the Plaintiff identifies another agency of the State of Oklahoma

which it believes may possess the information it seeks, the undersigned counsel could send the interrogatories to that agency for an appropriate response.

INTERROGATORIES

PLEASE ANSWER THE FOLLOWING:

1. Considering the constitutional infirmities of S.B. No. 458 (Okla. Stat. tit. 45, § 939 (Supp. 1986)), explain why the Governor of Oklahoma, who must have taken an oath to uphold the Constitution of the United States, did not veto that legislation.

OKLAHOMA'S ANSWER: This is an irrelevant question based on an erroneous legal conclusion and the State of Oklahoma hereby objects to its form and relevance.

2. Why did the Oklahoma legislature pass S.B. No. 458 (Okla. Stat. Title 45, Section 939 (supp. 1986)) (hereinafter

referred to as the "Act")? Explain in detail your answer.

OKLAHOMA'S ANSWER: In asking why the Legislature passed the Act you have asked what the legislative intent of the statute is. The intention of the Legislature in enacting the statute is a legal question determined by resort to the language used, available legislative history and the purpose served by the legislation. The statutes in question (the "Act"), which includes both §§ 939 and 939.1 promote lower utility rates, by insuring that Oklahoma electric utilities will not become solely reliant on a single source of supply primarily shipped by one railroad company. Reliance on sole suppliers and shippers constituted a threat to competitive utility rates when the Act was passed. The threat to reasonable utility rates was made even greater when Congress lifted rail price controls. These statutes also lessened the

potential harm from possible energy supply cutoffs.

3. * * * *

RESPECTFULLY submitted this 12th day of July, 1989.

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ATTORNEY GENERAL OF OKLAHOMA

NEAL LEADER
ASSISTANT ATTORNEY GENERAL
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CERTIFICATE OF MAILING

I certify that on the 12th day of July, 1989, I mailed a true and correct copy of the foregoing document to:

Mary Guthrie
Steve Jones
Senior Assistant
Attorneys General
123 Capitol Building
Cheyenne, WY 82002

THOMAS L. SPENCER

EXHIBIT 3 TO WYOMING'S EXHIBIT A

INFORMATION ON WYOMING COAL PRODUCTION

[Abstract of Totals from Stipulation of Facts]

Summary of Wyoming Coal Production

Year	Totals of Taxable Tons
1983	107,902,764
1984	125,931,455
1985	135,105,204
1986	128,145,751
1987	132,753,011
1988	163,815,884
89, 1st Qtr.	40,197,407
89, Pro Rated	160,789,628

EXHIBIT 4 TO CHAMBERS'S EXHIBIT B

[Abstract of Totals on Wyoming Severance Tax Collection]

	1987 Taxable Value	Severance Tax Rec'd @ 10.5%	1988 Taxable Value	Severance Tax Rec'd @ 8.5%
	* * * *	* * * *	* * * *	* * * *
TOTAL	$1,101,486,981	$115,554,537	$1,006,229,592	$85,473,220

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FILED
JUN 6 1991
OFFICE OF THE CLERK

(14)

No. 112, Original

In The

Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

vs.

STATE OF OKLAHOMA,

Defendant.

On The Report Of The Special Master Dated June 29, 1990

THE STATE OF WYOMING'S REPLY BRIEF TO THE STATE OF OKLAHOMA'S BRIEF

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On The Report Of The Special Master Dated June 29, 1990

THE STATE OF WYOMING'S REPLY BRIEF TO THE STATE OF OKLAHOMA'S BRIEF

INTRODUCTION

The State of Wyoming submits this brief in reply to the brief on the merits filed by the State of Oklahoma in response to the exceptions to the Special Master's Report which the State of Wyoming filed.

In addition to replying to Wyoming's exceptions, Oklahoma raises several additional issues.[1] Because a

[1] Oklahoma's brief does not focus on specific findings contained in the Special Master's report. Consequently, at times it is difficult to ascertain what aspects of the Special Master's report to which Oklahoma excepts.

reply brief is limited in length, some of Wyoming's arguments which address the unconstitutionality of OKLA. STAT., tit. 45, §939 (Supp. 1986) ("the Oklahoma Act.") are of necessity abbreviated. However, all of the issues raised by Oklahoma have been exhaustively addressed by the State of Wyoming in various documents which were earlier filed in this matter and which are part of the record. The State of Wyoming took no exceptions to the Master's findings and conclusions concerning the unconstitutionality of the Oklahoma Act.

SUMMARY OF THE ARGUMENT

The Special Master's Report of June 29, 1990 ("Tone Report") should be accepted by the Court. There is no basis on which the Court can uphold the Oklahoma Act, because it directly and inappropriately impinges upon interstate commerce.

The State of Wyoming has been injured by the Oklahoma Act to such an extent that it is appropriate for this Court to determine that Wyoming has standing to bring this original action.

ARGUMENTS

I. WYOMING HAS STANDING TO BRING AN ORIGINAL ACTION AGAINST OKLAHOMA.

The State of Wyoming brought this action to defeat protectionist legislation which violates Article I, Section 8, Clause 3, of the United States Constitution.

Oklahoma has repeatedly challenged Wyoming's standing. Oklahoma first raised this issue in opposition to Wyoming's Motion for Leave to File Complaint. This Court implicity rejected Oklahoma's argument and granted Wyoming permission to file the Complaint. *State of Wyoming, Plaintiff v. State of Oklahoma, Defendant*, No. 112, 487 U.S. 1231 (1988). After Wyoming's Complaint was filed, Oklahoma filed a Motion to Dismiss, based on the standing issue, which the Court denied again. *State of Wyoming, Plaintiff v. State of Oklahoma, Defendant*, No. 112, 488 U.S. 921 (1988). While this should have been an end to the issue, Oklahoma made another standing argument as part of its Motion for Summary Judgment, without any evidence supporting its argument that Wyoming was not injured by the Oklahoma Act. The Special Master rejected the Oklahoma argument. Tone Report, at 13, 34. Now, for a fourth time, Oklahoma brings this issue before the Court in its brief on the merits.

A. Wyoming has suffered direct injury as a result of the Oklahoma Act.

Oklahoma argues that Wyoming should not be granted standing to bring this suit because the effect of its legislation on the State of Wyoming is derivative, rather than direct. The injury suffered is further characterized as de minimis. Oklahoma cites no authority to support this view.

The Special Master relied on *Maryland v. Louisiana*, 451 U.S. 725, 734-35 (1981) and concluded that Wyoming's loss of severance tax revenues "fairly can be traced" to the Oklahoma Act, which constituted a direct injury of

the sort necessary to confer standing. An analysis of his decision shows it to be well supported and compelling.

The Wyoming severance tax is directly related to the extraction and sale of coal; the amount of tax collected is directly based on the amount of coal sold by Wyoming producers. The stipulated facts conclusively demonstrated that the Oklahoma Act affects the quantity of coal sold from Wyoming to Oklahoma utilities. Tone Report, at 6-7. The estimated loss in tax revenues to Wyoming is about one-half million dollars a year.[2]

Cases cited by the State of Oklahoma in its brief, *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C.Cir. 1976), *cert. denied* 429 U.S. 1977 (1976); *State of Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985), *cert. denied* 478 U.S. 1012 (1986); and *Louisiana v. Texas*, 176 U.S. 1 (1900), all involved general injuries to a state's economy which resulted in a consequential decline in general tax revenues. This case, however, represents a specific and direct injury in the form of a tangible loss of tax revenues.

Oklahoma argues that, if the Court affirms Wyoming's standing, it would "open the flood gates" and allow states to challenge the actions of other states based only upon the effect of a statute on a state's general economy and tax revenues. This overstated fear is unfounded. Wyoming's severance tax is based on coal production; the decrease in severance tax revenues can be

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[2] Wyoming submitted an affidavit from Mr. Richard J. Marble of the Wyoming Department of Revenue and Tax to prove this point. Oklahoma did not submit any affidavits or proof to refute this demonstration of injury.

directly traced to the Oklahoma Act. To affirm Wyoming's standing would not enlarge the jurisdictional basis and permit lawsuits based upon loss of general tax revenues.

Oklahoma also argues in great detail that the impact upon Wyoming's severance tax revenues is minimal. However, a loss in tax revenues of $535,886.00 in 1987 and $542,352.00 in 1988 cannot be regarded as de minimis.[3] Oklahoma cites no authority for its argument that, because the loss in tax revenue represents only a small fraction of the total tax revenues, the loss must be considered insignificant. A review of the relevant facts will reinforce the position that the injury suffered by Wyoming is sufficient to support standing.

B. Wyoming has presented an important and serious issue which deserves to be heard by this Court.

This Court has observed that the nature of the plaintiff's claim may play a role in determining whether this Court will grant standing. *Maryland v. Louisiana*, 451 U.S. at 739-45. The claim must be serious and dignified. This Court has limited the exercise of its original jurisdiction to "appropriate cases." Tone Report, at 13. Further, the

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[3] The loss of any revenues used to support governmental services must be considered very serious, at least to the recipients of those revenues. Wyoming has demonstrated that any loss in tax revenues creates significant problems for continued effective governmental operations, especially during a time of recession. To paraphrase Everett Dirkson, a half million dollars here and a half million dollars there, and pretty soon real money is involved.

availability of another forum where there is jurisdiction for the named parties and where appropriate relief may be obtained is also a consideration in determining whether there is standing. *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1988).

An important issue of federalism is at stake here. Whether a state can pass a law requiring certain of its citizens to purchase a commodity produced within its borders is an issue which strikes at the heart of the commerce clause proscription against economic protectionism. The Oklahoma Act has repercussions that will be experienced beyond the instant case. As pointed out in the amicus curiae brief of the Wyoming Mining Association, other states have passed statutes or are considering statutes which would impose similar coal purchase requirements on electric utilities. The danger of Balkanization of several states is readily apparent.

The issue which the State of Wyoming brings before this Court is of a dignified, serious and important nature. Cases arising under the commerce clause of the United States Constitution have been addressed by this Court since the early days of the nation. The tendency towards economic protectionism by individual states is obviously strong, but the founding fathers realized that such protectionist efforts must be prevented so that states may function as a nation.

The appropriate forum for the State of Wyoming to raise this issue is the United States Supreme Court. Attempts of others to raise this issue in other forums

have been dismissed for lack of standing. *Northeast Oklahoma Electric Cooperative, Inc. v. Grand River Dam Authority*, Case No. C-88-127 (Dist. Ct. Craig County, Okla.), referred to in the Tone Report, at 13.

C. Oklahoma's challenge to Wyoming's standing is precluded by the law of the case.

This Court's prior rejections of Oklahoma's standing challenge constitute the "law of the case." Consequently, Oklahoma is precluded from revisiting this issue. When a court decides upon a rule of law, any such rulings must continue to govern the matter in subsequent stages of the same case. *Arizona v. California*, 460 U.S. 605, 619 (1983). The principles of repose which support the doctrine are fully applicable to original proceedings before this Court. *Arizona v. California*, 460 U.S. at 617, 619. Only in extraordinary circumstances should issues which have become the "law of the case" be reconsidered. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-817 (1988).

Oklahoma has made no showing that would justify reopening the question of Wyoming's standing. This Court's decision is not clearly erroneous nor does it work a manifest injustice. Oklahoma's standing arguments presented to the Court for the fourth time are identical to those advanced earlier. Oklahoma presents nothing new. Oklahoma's latest attempt to raise this issue should be rejected by this Court.

II. THE OKLAHOMA ACT'S DELIBERATE DISCRIMINATION AGAINST INTERSTATE COMMERCE CANNOT BE JUSTIFIED.

In its brief on the merits, Oklahoma does not specifically identify the aspects of the Report of the Special Master to which it excepts. A fair reading of the brief, however, makes it clear that Oklahoma does not challenge the finding of the Special Master that the Oklahoma Act discriminates against interstate commerce, both on its face and in its practical effect. Tone Report, at 19-21. However, Oklahoma argues that such discrimination may be justified. Apparently, Oklahoma has taken exception to that portion of the Report of the Special Master which found that the Oklahoma Act could not be justified by any purpose advanced by Oklahoma. Tone Report, at 22-29.

A straightforward reading of the Oklahoma Act demonstrates an intent to provide economic aid and comfort to the Oklahoma coal mining industry. Nevertheless, Oklahoma has attempted to advance acceptable justifications to support the constitutionality of the Act.

Oklahoma's effort to provide post hoc justifications to support the Act were found by the Special Master to be purely economic in nature. Tone Report, at 26. The arguments that the Act is necessary to assure a readily available coal supply and to avert the possibility that Oklahoma coal purchasers will be forced to rely on a single shipper of coal are unsupported by fact.

If availability of a reliable coal supply had been a concern of the Oklahoma legislature, it could have

adopted several acceptable approaches, including requiring electric utilities to maintain a stockpile of a certain amount of coal to be used only if coal became unavailable or if the price of coal changed radically in a short period. The Oklahoma legislature did not do this. Clearly, nondiscriminatory alternatives existed to address the problem of potential fuel supply shortages.

A. The Act cannot be justified as a method of conserving clean coal.

Oklahoma introduces, for the first time in this proceeding, another justification for the Act. It argues that by requiring that less Wyoming coal be burned in Oklahoma, the Oklahoma legislature has taken steps to conserve the available supply of clean coal available to its electric utilities. This curious argument is based on the fact that Wyoming coal is a cleaner fuel source than Oklahoma coal because it has a lower sulphur content.

This argument should be rejected because Oklahoma did not raise it before the Special Master. The point was never argued by Oklahoma and, consequently, Wyoming did not have the opportunity to introduce any facts regarding the future availability of clean burning, low sulphur coal.[4] Conservation of Wyoming's clean coal by

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[4] The Court may want to take judicial notice that it is widely known throughout the coal industry that the available supply of low sulphur, clean burning, sub-bituminous coal, found throughout the Powder River Basin of Wyoming, is estimated to be in excess of 110 billion tons. Geological Survey

(Continued on following page)

Oklahoma may be a laudable goal, but it cannot be the basis of upholding unconstitutional legislation.

B. Oklahoma did not attempt to prove that the purposes of the Oklahoma Act could not be achieved by nondiscriminatory means.

As a general rule, when a statute discriminates on its face, the Court may nevertheless uphold it if it serves a legitimate local purpose and there are no nondiscriminatory alternatives to the legislation. *New Energy Company v. Limbach*, 486 U.S. 269, 273 (1988); *Brown-Forman Distillers Corp. v. New State Liquor Authority*, 476 U.S. 573, 579 (1986). *Pike v. Bruce Church*, 397 U.S. 137, 141 (1970). Oklahoma has the heavy burden of proving each of these elements. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Oklahoma has not met its burden. It has not demonstrated that the Act fulfills a legitimate local purpose. Furthermore, as the Special Master pointed out, Oklahoma did not attempt to demonstrate that there were no available nondiscriminatory alternatives. Tone Report, at 24.

Both elements must be shown for a facially discriminatory statute to survive commerce clause scrutiny. Oklahoma merely offers the bare assertion that the Act has a legitimate local purpose and that there are no other means of accomplishing the Act's purpose.

(Continued from previous page)

of Wyoming, *Guidebook of the Coal Geology of the Powder River Basin*, Public Information Circular No. 14, at 126 (1980). Therefore, it is readily apparent that at current rates of extraction, Wyoming coal will be available for several hundred years.

III. THE OKLAHOMA ACT CANNOT BE JUSTIFIED AS A LEGITIMATE METHOD OF REGULATING RETAIL ELECTRIC UTILITY RATES.

Oklahoma has argued that the Act "is well within Oklahoma's authority to regulate retail rates of electric utilities." Oklahoma's brief on the merits, at 65-66. This assertion is not accurate.

A. The Act does not regulate utility rates.

While the Special Master assumed for the purpose of his decision that the Act constitutes utility rate regulation, this Court need not make such an assumption. In plain language, the Act limits the source of ten percent of the coal used by Oklahoma electric utilities. The Act "purports to exclude coal mined in other states based solely on its origin." Tone Report, at 20. Its purpose was to encourage the production and sale of Oklahoma coal, not aid Oklahoma consumers by regulating their utility rates.[5] The Act permits the increase of utility rates up to five percent. OKLA. STAT., tit. 45, §939.1 (Supp. 1986). The acceptable increase permitted by the Act is directly contrary to Oklahoma's rationale that the legislation insures lower local utility rates.

Because the Act clearly does not regulate utility rates, Oklahoma's reliance on decisions dealing with a state's authority to regulate utility rates is not relevant to the

---

[5] Oklahoma has admitted that, "in advancing the interests of its rate payers, it chose also to enhance local production and availability of coal." (Response to Request Admissions, paragraph 1).

question of the constitutionality of a statute which does not regulate rates.

B. Even if the Act is assumed to regulate rates, it is not immune from Commerce Clause scrutiny.

Oklahoma argues in Proposition IV of its brief on the merits, at 55-66, that the Act does not implicate the commerce clause because it constitutes a legitimate utility rate regulation within its "lawful authority." Apparently, this argument is an exception to the Special Master's conclusion that the Act is not immune from commerce clause scrutiny as part of Oklahoma's regulation of utility rates. Tone Report, at 29-30.

While it may be true that states have some authority to regulate retail utility rates, including rates paid for electricity sold in interstate commerce, this does not mean that such utility rate regulation is immune from commerce clause scrutiny. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 393 (1983).

None of the cases cited by Oklahoma support state discrimination against the free flow of interstate commerce through the regulation of utility rates. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), allowed the regulation of wholesale utility rates, under some circumstances, by the states. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), permitted states to impose moratoriums on the construction of nuclear power plants pending a showing of adequate storage facilities for nuclear waste. The impact on interstate commerce was not even discussed. Similarly, *Central Hudson Gas & Electric Corp. v. Public*

Service Commission, 447 U.S. 557 (1980), involved the First Amendment to the United States Constitution. The issue was whether a state could ban advertising by an electric utility. In *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951), a state law requiring natural gas sellers to obtain a permit survived commerce clause scrutiny; however this Court made no statement that laws regulating utilities were immune from commerce clause scrutiny.

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982), is a useful example of "utility regulation" which violated the commerce clause. The State of New Hampshire had attempted to impose a ban on the selling of hydroelectric power by an electric utility to customers located outside New Hampshire. The Court invalidated the ban. These is no suggestion in the opinion that even a partial ban on the sale of hydroelectric power outside the state was permissible.

IV. THE SEVERABILITY DOCTRINE OF STATUTORY CONSTRUCTION CANNOT BE APPLIED TO THE OKLAHOMA ACT.

The State of Wyoming does not dispute Oklahoma's argument that a state, as a market participant, can set purchase quotas for state-owned electric utilities. Oklahoma, however, has not written such a statute. The doctrine of severability cannot be used to save the Oklahoma Act where, as in this case, it would require the extreme measure of judicially amending the language of the Act. See Corrected Exceptions of the State of Wyoming to the Report of the Special Master, at 8-12.

CONCLUSION

The Oklahoma Act is discriminatory on its face and in its practical effect. This conclusion of the Special Master is not disputed by the State of Oklahoma.

The Oklahoma Act cannot be justified as serving any legitimate local purpose. Even assuming there were any legitimate local purposes, Oklahoma failed to present evidence that there are no nondiscriminatory alternatives available to serve those local purposes.

There is no adequate justification for upholding the Oklahoma Act which is discriminatory on its face. The Act should be struck down by this Court because it violates the commerce clause of the United States Constitution. This unconstitutional legislation cannot be saved, even in part, by applying principles of severability to the wording of the Act.

Respectfully submitted,

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